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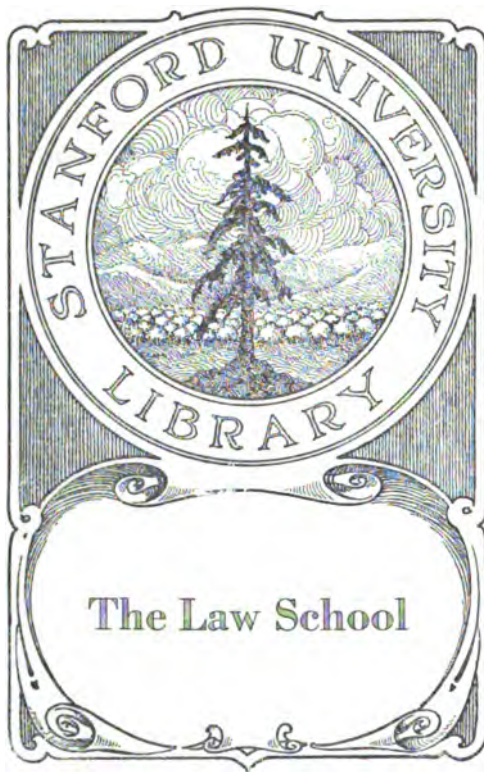
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THE  
INSOLVENCY LAW OF VICTORIA



THE  
INSOLVENCY LAW  
OF  
VICTORIA <sup>C</sup>

COMPRISING

AN EXPOSITION OF THE LAW AND PRACTICE RELATING TO INSOLVENCY AND DEEDS OF ARRANGEMENT IN THE COLONY OF VICTORIA, INCLUDING THE INSOLVENCY ACT 1890, THE INSOLVENCY ACT 1897, THE INSOLVENCY ACT 1898, THE RULES OF THE SUPREME COURT 1884 (INSOLVENCY), THE RULES UNDER PARTS VI. AND VIII. OF THE INSOLVENCY ACT 1897, AND THE INSOLVENCY RULES 1898.

By

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## PREFACE.

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It has been the desire of the writer of this work to embrace in the text the law and practice of Insolvency drawn from the sources of the Statutes, Rules and reported decisions of the Victorian and English Courts. The text is divided into eleven chapters, based as nearly as possible on the eleven Divisions or Parts of the Act of 1890. Chapter II., "Practice," only relates, it is proper to mention, to matters of practice which are not dealt with elsewhere in the text. The Appendix comprises the Insolvency Acts, and the Rules of the Supreme and Insolvency Courts and forms up to date, the pages where the subject matter of each section or rule is dealt with in the text being given in figures at the end of each section or rule. The repealed sections of the Act of 1890 are printed in italics, and the other sections of such Act amended or affected by the Act of 1897 are marked as the case may be in the margin opposite to such particular sections. Comparisons, where necessary, have been made throughout the text to the English and other sources whence the sections of the Acts of 1890 and 1897 have been derived, but in the case of the Rules the comparisons appear in the margin either opposite to each rule or at the head of a group. The writer has to express his sincere thanks to Mr. P. R. Cotes, a Barrister and Solicitor of the Supreme Court, for much valuable assistance rendered in the course of the preparation of this volume.

W. H. LEWIS.

*Melbourne,  
October, 1899.*





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Page 223.—Add to note (q), as to meaning of void, the case of *Simson v. Mitchell*, 5 W.W. & a'B. (L.), at p. 119.

„ 365.—Add to note (p), as to medical or personal examination of insolvent, the case of *Board of Trade v. Block*, 13 Appeal Cases, 570.

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S. 37, Act of 1890—  
*Going behind judgment*  
—*False return*—Costs.

When the object is to go behind a judgment for the purpose of showing that the petitioning creditor's debt is a partnership one the Court will not allow the respondent to do so, though it is open to him to go behind the judgment to show that it was the result of collusion. Where the respondent told the sheriff's officer—"I have got land at Benambra which you can levy on if you please. It is not mortgaged," and the sheriff's officer made a return that the respondent had no real or personal estate whereof the money required to be levied or any part of it could be satisfied, on the respondent's statement being proved to be correct, the return was held to be false, and the order *nisi* discharged without costs, as the fault was that of the sheriff's officer, and not that of the petitioning creditor. *In re Rylah, ex parte The Colonial Bank of Australasia Limited*, 24 V.L.R., 844 ; 20 A.L.T., 277 ; 5 A.L.R., 122. *Vide* text, at pp. 98, 99, 126 to 130, and 56, 57.

S. 37 (6), Act of 1890,  
rr. 175, 179—*Appendix*  
*Form 6*.

A debtor's summons on which the name and address of the solicitor appears on its back is sufficient compliance with the Insolvency Rules. An equitably assigned debt is a good petitioning debt although no notice of the assignment has been given to the debtor. *In re Morrissey*, 20 A.L.T., 279. *Vide* text, at pp. 85, 120 to 125.

*Proof of debt—Wagering.*

A contract for the sale or purchase of stocks and shares which is in effect a bargain for differences only is a contract by way of gaming or wagering within s. 18 of the *Gaming Act* 1845, and proof cannot be made. *Vide* text, at p. 280, and s. 72, *Police Offences Act* 1890. *In re Gieve, ex parte Trustee*, 6 Manson, 136 ; (1899) 1 Q.B., 794.

*Proof of debt—Damages recovered in divorce suit—Marriage Act 1890, ss. 93, 94.*

Damages obtained by a petitioner in a divorce suit against the co-respondent which are subject to any order of the Court appropriating them to any particular purpose are a debt or liability which is provable in the bankruptcy of the co-respondent, though under the Act they are not a debt which will support a bankruptcy petition. *In re O'Gorman, ex parte Bale*, 6 Manson, 204; (1899) 2 Q.B., 62.

*Proof of Debt—Bills of Exchange (s. 68, Instruments Act 1890)—Valuation and Consolidation.*

Although under ordinary circumstances a creditor may, in proving, lump together his debts and securities, yet a holder of two bills of exchange, proving in the bankruptcy of the last indorser for the aggregate sum of the two amounts secured by the bills, cannot, where the bills are drawn and accepted by different persons, retain a surplus over twenty shillings in the pound obtained by proving against the estates of the drawer, acceptor, prior indorsers and the last indorser of the one bill, and attribute it to a deficiency on the other bill; but the bills, for the purposes of proof, must be treated as constituting distinct transactions, and the surplus of the one bill must be brought into account without regard to the deficiency of the other bill. Inasmuch as drawers, acceptors, and prior indorsers are liable to indemnify the subsequent indorser, the dividends paid by their estates are paid out of the assets of the subsequent indorser, and his estate is therefore entitled to have the surplus which has been paid on one of the bills (not exceeding the amount of such surplus paid by his estate) paid to it, and the overpaid bill handed over to his trustee. *In re Morris, James v. London and County Banking Co.*, 6 Manson, 178; (1899) 1 Ch., 485. *Vide text*, pp. 293 to 297.

*Proof of Debt—Postponement of Creditor under ss. 6 and 7, Partnership Act 1891.*

As a further instance of the postponement of a person proving who has lent money on terms of sharing profits, *vide In re Mason, ex parte Bing*, 6 Manson, 169; (1899) 1 Q.B., 810. *Vide text*, at p. 303.

*Dividends — Assignment of Debts after Proof, s. 42, Act of 1897, rr. 5 and 241.*

A trustee under the analogous section and rules of the *Bankruptcy Act 1883* cannot recognise the title of an assignee of a proof to a dividend declared in bankruptcy, and apparently the assignee's remedy is to prove, and get his proof substituted for that of the original creditor, the assignor. *In re Frost and Frost, ex parte Official Receiver*, 6 Manson, 194; (1899) 2 Q.B., 50. *Vide text* pp. 318, 319.

*As to s. 118 (1), Act of 1897, and Restriction of rights of Creditors under Execution, s. 77, Act of 1890.*

The rights of execution creditors are not restricted under the analogous sections of the *Bankruptcy Act 1883*, ss. 45 and 125. *Hasluck v. Clark*, 6 Manson, 146; (1899) 1 Q.B., 699. *Vide text*, p. 94.

*After-acquired Property.*

Where an undischarged bankrupt, who is a solicitor, assigns for value taxed costs due to him, his trustee, by giving notice of his claim to the person by whom such costs are payable before the assignee, acquires priority over such assignee. *In re*

*Beall, ex parte Official Receiver*, 6 Manson, 163; (1899) 1 Q.B., 688; following *Mercer v. Vans Colina*, 4 Manson, 363. *Vide text*, pp. 213-217.

*Fraudulent Preference.*

The decision of the Court of Appeal in the case of *New, Prance and Garrard's Trustee v. Hunting*, (1897) 2 Q.B., 19, has been affirmed by the House of Lords. *Sharp v. Jackson*, (1891) A.C., 419. *Vide text*, at p. 237.

*Voluntary Settlement.*

Where a donor within two years of his bankruptcy gave to the donee a valuable pearl necklace and certain furniture, or money to be expended in the purchase of furniture, with an intention that such property should be retained by the donee for an indeterminate time, but without imposing any restriction on the donee's power to alienate it, the transaction was held to be a settlement within the meaning of the section. *In re Tankard, ex parte Official Receiver*, 6 Manson, 188; (1899) 2 Q.B., 57. *In re Vansittart, ex parte Brown*, (1893) 1 Q.B., 181; *In re Player, ex parte Harvey*, 15 Q.B.D., 682, followed. *Vide text*, pp. 221, 222, 228.

*Ss. 17, 32, 66-72, Act of 1897—Appointment and confirmation of Trustees in Insolvency—Objections to Trustee's Appointment by Official Accountant.*

The effect of s. 17, Act of 1897, is to practically provide for the whole business of the appointment and confirmation of the appointment of trustees—not their appointment only—and sub-s. 4 of s. 17 makes it plain that objections to the confirmation of the trustee can only be preferred by the insolvent or any creditor and not by the Official Accountant, and the Official Accountant has no power to take proceedings against a trustee before the trustee's appointment has been confirmed. *In re Bailey*, 25 V.L.R., 1; 21 A.L.T., 58; 5 A.L.R., 187. *Vide text*, pp. 170, 171 190.

*Districts in which proceedings are to be conducted—Ss. 36 and 51, Act of 1890—Proceedings by Official Accountant as to misconduct of assignees or trustees—S. 67, Act of 1897.*

Ss. 36 and 51, Act of 1890, mean that the ordinary and general proceedings connected with the sequestration of estates shall be conducted in the district in which the sequestration takes place. Mere misconduct on the part of an assignee is not part of the proceedings in the sequestration. Disciplinary matters may be dealt with outside the district, and proceedings by the Official Accountant under s. 67, Act of 1897, to deal with an assignee or trustee for alleged misconduct, may be taken in Melbourne without an order transferring the proceedings. *In re White*, 21 A.L.T., 77; 5 A.L.R., 225. *Vide text*, p. 190.

*Deed of Arrangement "for benefit of creditors generally"—S. 74, Act of 1897.*

Under the analogous section of the *Deeds of Arrangement Act* 1887, s. 4, it has been held that whether a deed is one within the Act is a question of fact in each case, and where a debtor in consideration of an immediate advance of £100 by one of two trustees assigned all his personal estate to the trustees upon trust to sell, and out of the proceeds in the first place to repay the £100 to the advancing trustee, and in the second to discharge the debtor's debts and liabilities, and in

the third to hold the residue in trust for the debtor's daughter, the creditors not being parties to the deed, though it was communicated to them, it was held that the primary object of the deed was to benefit the debtor and his daughter, and not the debtor's creditors generally, and therefore the deed was not within the *Deeds of Arrangement Act* 1887, and consequently was not void for want of registration. *In re Hobbins, ex parte Official Receiver*, 6 Manson, 212, and at p. 215. *Vide* text, pp. 440 to 450.

*Ss. 27 (3), 88, 115, Act of 1897—Deed of Arrangement—Costs—Taxation.*

The bill of costs of a barrister and solicitor under a deed of arrangement are within s. 27 (3), Act of 1897, and must be taxed by the chief clerk before payment thereof is allowed in the trustee's accounts, and by the same section the chief clerk must satisfy himself as to each item in the bill as well as in reference to the whole matter that the employment of a barrister and solicitor was reasonable. *In re Cameron*, 25 V.L.R., 59; 21 A.L.T., 46; 5 A.L.R., 171. *Vide* text, p. 50.

## ERRATA.

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- Page 12.—Ninth line from bottom of page, read “seizure” for “sequestration.”
- „ 38.—Second last line, read “Act of 1890” instead of “1898.”
- „ 100.—Note (*t*), read “Act of 1890” instead of “1896.”
- „ 105.—Note (*t*), read “rule 3” instead of “31.”
- „ 171.—Note (*w*), read “Act of 1897” instead of “1890.”
- „ 194.—Opposite marginal note “As to release,” read “Act of 1890” instead of “1897.”
- „ 230.—In fourteenth line, read “Part 8, Act of 1897” instead of “s. 8, Act of 1897.”
- „ 424.—In second line, read “sequestration” instead of “liquidation.”

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## INTRODUCTION.

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THE Imperial Statutes, 4 Geo. IV. c. 96, and 9 Geo. IV. c. 83, introduced into these colonies the English Bankruptcy Law, and the first local enactment affecting the district now known as Victoria was the Act 11 Geo. IV. No. 7, passed by the Legislature of New South Wales. That Act was passed to make provision for Early Acts. the relief of insolvent debtors, and for an equal distribution of their estates and effects among their creditors under certain restrictions. It provided for the sequestration of an insolvent debtor's estate where process had been issued against him. Under such Act the realization of the estate was made by three or more creditors chosen by the majority, or by some other fit person approved by the Court, and the certificate of discharge was granted to the insolvent on the consent of the majority of his creditors. The Act referred to expired on 3rd April, 1832, when the Statute 2 Will. IV. No. 11, which dealt chiefly with relief of debtors detained in prison, came into operation. This Act was of a temporary nature, but was continued by the Statutes 5 Will. IV. No. 4, and 6 Will. IV. No. 18, and with slight modifications by the Statutes 2 Vict. No. 14, and 4 Vict. No. 24.

These Statutes were in the year 1841 repealed by a very comprehensive measure, 5 Vict. No. 17. Its object was to make provision for giving relief to persons who, by misfortune, and without the guilt of fraud or dishonesty, became insolvent, and for the due collection, administration and distribution of insolvent estates, and for the prevention of frauds affecting the same. It gave The Act 5 Vict. No. 17. the power to an insolvent debtor to voluntarily petition for the sequestration of his estate, and the same right to persons vested

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with the administration of estates of others (a). It also declared certain acts should be taken to be acts of insolvency, on the commission of which by the debtor any creditor of his to the extent of £50, or two or more creditors to the extent of £100, could petition. It also dealt with many of the provisions of bankruptcy. Provision was made in it for the examination of the insolvent and other persons before the Supreme Court or a commissioner of insolvent estates, and the certificate of discharge was granted by the Supreme Court, three-fourths in number and value of the proved creditors having also to consent. Under it a chief commissioner of insolvent estates for the District of Port Phillip was appointed by the resident judge in that district of the New South Wales Supreme Court. From time to time the Act was modified by the Statutes 7 Vict. No. 19, 8 Vict. No. 15, and 10 Vict. No. 14, and with such modifications it continued in force in Victoria until the Statute 28 Vict. No. 273 was passed by the local Legislature, some fourteen years after the separation of Victoria from New South Wales. By this enactment commissioners were appointed to aid and assist in carrying out the Act, and for that purpose were obliged to do and execute all matters and things which by any rule or order of the Supreme Court of the colony or any judge thereof they were required to do. Victoria was divided into districts, and commissioners were attached to each. This Act dealt, like the 5 Vict. No. 17, with voluntary and compulsory sequestrations, and the estate on sequestration was vested in the hands of an official assignee, the creditors having a right to elect another to act jointly with the official. The certificate was granted by the commissioner, but had to be subsequently allowed by the Court, and provision was made for the release of the estate on three-fourths in number and value of the creditors accepting an offer of composition. The Act had *inter alia* provisions dealing with the effect of the order of sequestration, the powers and liabilities of assignees, offences by the insolvent and other persons, and also provisions in respect to deeds of assignment which were dropped in the subsequent Act but its provisions in respect thereto and to the accounts of trustees bear some resemblance to the latest amendment of the law.

The Act of 1865.

(a) The right of the debtor to petition for the adjudication of his estate in England is traced in *Ex parte and in re*

*Painter*, (1895) 1 Q.B., at p. 88; 1 *Man.* at p. 502.



This Act and its amendments were superseded by the *Insolvency* The Acts of 1871 and 1890. *Statute* 1871 (34 Vict. No. 379), and the subject was dealt with in a more pretentious manner. The Court of Insolvency was established and declared to be a Court of Record and a Court of Law and Equity (b). This Act was based mainly on 32 & 33 Vict. c. 71, and the earlier Acts in force in Victoria. The provisions as to offences comprising Part XI. of the Act were mainly borrowed from 32 and 33 Vict. c. 62 (c). Its objects, therefore, were relief to insolvent debtors, an equal and fair distribution of the property amongst the creditors, and punishment for offences against this branch of the law. The Act referred to and its amendment (d) were consolidated without material alteration by the Act of 1890 (54 Vict. No. 1102), which, subject to the amendments made by the Act of 1897, constitutes the present statute law. The Act of 1897 *inter alia* amplifies the jurisdiction of the The Act of 1897. Court, provides further and very effectual machinery for the administration of estates and the control of trustees, seeks to improve the law as to certificates of discharge and compositions, and provides for the registration of deeds of arrangement and applies various provisions of the Acts thereto. It also amends the law relating to examinations, and provides that in certain cases these may be held before police magistrates, an extension of the practice which should eventually be of much utility. The provisions of the Act of 1897 and of the new Rules are mainly adopted from the sections and schedules of the *Bankruptcy Acts* 1883 and 1890, the *Deeds of Arrangement Act* 1887, and of the rules under those Acts.

The general principles of the English Bankruptcy Law as it General principles of English Bankruptcy Law. existed in 1828 were introduced into this country by the Act 9 Geo. IV. c. 83, and still apply, except in so far as they have been modified by the local Statute Law (e), and as both the Acts and Rules now in force have been so largely adapted from English sources, repeated reference is consequently made throughout this work to English authorities.

As to the force and effect of English decisions on our Courts, Force of English decisions. those of the Privy Council, being the ultimate Court of Appeal

(b) S. 6.

(c) *The Debtors Act*.

(d) 35 Vict. No. 411.

(e) *Vide Rolfe v. Flower*, L.R. 1 C.P., 27; and *Hoare v. The Oriental Bank Corporation*, 2 A.C., at p. 596.

for the colony, are conclusive. The decisions of the Court of Appeal are authorities when they are based upon the terms of an Act identical with one in force in Victoria (*f*), and under the same circumstances the judge of the Supreme Court dealing with insolvency would not venture, it has been stated, to depart from the authority of the English Chancellors (*g*).

As to existing  
English Bank-  
ruptcy Acts.

As to the application of the existing English *Bankruptcy Acts*, it has been indicated that they only apply, either when it has been expressly declared by the Imperial Parliament that they shall apply, or must from the language of the Acts be necessarily so intended, and then to the extent only to which they have been declared, or must necessarily be intended, to apply (*h*).

(*f*) *Vide Stone v. Kendall*, 14 V.L.R., at p. 685; 10 A.L.T., 175; *Trimble v. Hill*, 5 A.C., 342; *Harding v. Board of Land and Works*, 6 V.L.R., at p. 394; *Ex parte Gregory, in re Royce*, 1 W.W. & a'B. (L.), at p. 61; *In re McLeod's Will*, 1 W. & W. (E.), at p. 134.

(*g*) *In re Bryant*, 4 W.W. & a'B. (L.), at p. 10.

(*h*) *Federal Bank of Australia Ltd. v.*

*White*, 21 V.L.R., 451, at p. 471; 1 A.L.R., at pp. 148, 149; in this case the authorities of *Sill v. Worswick*, 1 H. Bl., 680, approving of *Cleve v. Mills*, cited in 3 Burge's Colonial Law, 907; *Phillips v. Hunter*, 2 H. Bl., 402; *Ellis v. McHenry*, L.R. 6 C.P., 228; and *Callender, Sykes & Co. v. The Colonial Secretary of Lagos*, (1891) A.C., 460, are discussed.

# THE INSOLVENCY LAW

OF

## VICTORIA.

### CHAPTER I.

- 1.—*Constitution of Court.*
- 2.—*Jurisdiction.*
- 3.—*Trial by Jury.*
- 4.—*Appeals.*

- 5.—*Jurisdiction as to Penalties and Offences.*
- 6.—*As to Lunatics.*
- 7.—*Limitation of Actions under the Acts.*

#### 1.—CONSTITUTION OF THE COURT.

THE Court of Insolvency and its powers are creatures of Statute (a), and by virtue of 28 & 29 Vict. c. 63, s. 5, the Court of Insolvency was established in and for Victoria by the *Insolvency Statute* 1871, and by the Act of 1890 it is declared to have been established in and for Victoria. It is a court of record, and of law and equity, and it has a seal of which judges and justices take judicial notice (b). In case of the death, resignation or removal of any judge of the Court of Insolvency, the Governor-in-Council may appoint a fit person in his place to be a judge of the said Court, who is a barrister-at-law of Victoria of seven years standing, or has practised as an advocate or barrister either in England, Ireland, Scotland, Victoria, or any of them, for such period as shall make an aggregate of seven years (c). A judge appointed under this section cannot, during his continuance in such office, practice as a barrister-at-law or be capable of being elected or of sitting as a member of Parliament (d). All judges of County Courts in Victoria are judges of the Court, and the Court may be held by and before any of the judges thereof at different places in Victoria at the same or at different times. The Governor-in-Council may, in

Its establishment and nature.

The seal.

Appointment and qualification of judge.

Judges of the Court.

(a) *Vide In re Ellison*, 19 V.L.R., at p. 551.  
(b) S. 5, Act of 1890.

(c) S. 7, Act of 1890.  
(d) S. 7, Act of 1890.

## CHAP. I.

Power to  
appoint acting  
judges.

Power to  
appoint chief  
clerks.

Power to make  
rules.

Scope of rules.

When rules take  
effect.

Proviso as to  
prior principles  
practice and  
rules.

case of necessity, appoint some fit and proper person possessing the qualification aforesaid to act for and in the stead of any of the judges of the Court, and such so acting judge has, uses, and exercises all the powers, authority, jurisdiction, rights and privileges of the judge in whose stead he is appointed (e). Subject to the provisions of the *Public Service Act* 1890, the Governor-in-Council may appoint one or more chief clerks of the Court for each district, and any such chief clerk may remove, and upon the death, resignation, or removal of any such chief clerk, may appoint another in his stead (f). The Governor-in-Council may also appoint any two of the judges of the said Court, together with a law officer, two of whom shall form a quorum, to frame rules for the following purposes:—(1.) For regulating the practice and procedure of the Court of Insolvency and the fees to be paid therein, and the several forms of petitions, affidavits, orders, summonses, warrants, commissions, and other proceedings to be used in the said Court in all matters under the Acts. (2.) For regulating the duties of insolvents, the trustees and assignees, and other officers of the Court. (3.) For regulating the transmission of orders, depositions, and other documents, and the transference of proceedings from one district to another. (4.) For regulating service of process of any kind issuing out of the said Court, including provisions for substituted service. (5.) For regulating the proceedings at meetings of creditors, the notice to be given thereof, and the places where the same shall be held. The rules may prescribe regulations as to the valuing of any debts provable in insolvency, as to the valuation of securities held by creditors, as to the giving or withholding interest or discount on or in respect of debts or dividends, and as to any other matter or thing, whether similar or not to those above enumerated, in respect to which it may be expedient to make rules for carrying into effect the object of the Acts (f<sup>2</sup>); and any or all of such rules may be repealed, varied or altered as occasion may require, and all rules so made are promulgated by and take effect from the date of publication in the *Government Gazette*. So far as rules do not extend, the principles, practice and rules on which the Supreme Court has heretofore acted in dealing with insolvency proceedings are observed (g). All

(e) S. 8, Act of 1890.

(f) S. 10, Act of 1890.

(f<sup>2</sup>) As to scope of rules *vide* also *In re Brann*, 3 W.V. & A'B. (I.), 6; *In re*

*Smith*, 3 A.J.R., 18.

(g) S. 12, Act of 1890—compare 32 & 33 Vict. c. 71, s. 78; s. 1, Act of 1897.

rules to be made under this section must be laid before both Houses of Parliament within ten days after their being promulgated, or if Parliament be not then sitting as soon as Parliament thereafter assembles for the despatch of business, and all such rules are judicially noticed (*g*). CHAP. I.  
Rules judicially noticed.

It is provided by r. 454 that non-compliance with any of the *Insolvency Rules* 1898 or with any rule of practice for the time being in force shall not render any proceeding void unless the Court shall so direct, but such proceeding may be set aside either wholly or in part as irregular or amended, or otherwise dealt with in such manner and upon such terms as the Court may think fit. Non-compliance with rules.

All orders of the Court or a judge are enforced in the same way as orders of the Supreme Court or of a judge of the Supreme Court are now enforced, or in such other mode as may be prescribed (*h*). Every order of the Court may be enforced as if it were a judgment to the same effect (*h*<sup>2</sup>). All barristers-at-law and attorneys of the Supreme Court may practise and be heard in the Court subject to the rules (*i*). How orders enforced.  
Practitioners.

## 2.—JURISDICTION.

All debtors, including aliens, and denizens and persons having privilege of Parliament, are subject to all the provisions of the Acts, and entitled to the benefits thereby given (*j*), and every married woman is subject to and entitled to the benefits given by the *Insolvency Acts* in the same way as if she were a *feme sole* (*k*). Who are subject to the Act.

By the Act of 1890 the Court is a Court of law and equity, and it has and may use for the purposes of such Act all the powers, rights, incidents, and privileges of the Supreme Court of Victoria (*l*), and the judges of the Court when sitting in Chambers for the despatch of business have and may exercise all the same and like powers as "are now possessed by any "judge of the Supreme Court sitting in Chambers" (*m*), and it is also enacted therein (*n*) that the Court shall have original juris- Extent of Court's jurisdiction.  
Under ss. 5 and 6, Act of 1890.

(*g*) S. 12, *ante*.

(*h*) *Ibid.*, s. 17—compare 32 & 33 Vict. c. 71, s. 66. As to the practice as to such, see Chapter II.

(*h*<sup>2</sup>) R. 103.

(*i*) S. 5, Act of 1890.

(*j*) S. 19, Act of 1890—compare 32 & 33 & Vict. c. 71, s. 120.

(*k*) S. 119, Act of 1897.

(*l*) S. 5, Act of 1890.

(*m*) S. 55 of the *Supreme Court Act*, and Orders 54 and 55 of the *Supreme Court Rules* 1884 deal with the powers of a judge of that Court in Chambers.

(*n*) S. 6, Act of 1890.

## CHAP. I.

Under s. 5, Act  
of 1897.

Interpretation  
of jurisdiction  
sections by  
decisions.

diction and control in all matters of insolvency, save where it is otherwise by such Act expressly provided, and the Court by the same authority may hear and determine any matter relating to the disposition of the insolvent estate or of any property taken under the sequestration and claimed by the assignees or trustees for the benefit of the creditors, or relating to any acts done or sought to be done by the assignees or trustees in their character of assignees or trustees by virtue or under colour of the sequestration, and also in any matter of insolvency as between the assignees or trustees, and any creditor or other person applying or otherwise submitting to the jurisdiction of the Court, and in any matter where the Court has jurisdiction by virtue of such Act. Under the Act of 1897 the jurisdiction is added to as follows:—Subject to the provisions of such Act the Court has full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court deems it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case (o). The jurisdiction given by this section must not be exercised for the purpose of adjudicating upon any claim not arising in the insolvency unless all parties to the proceeding consent thereto, or the money or money's worth in dispute does not in the opinion of the judge exceed in value five hundred pounds (p). The general jurisdiction of the Court thus large and important is to be determined from the sections referred to. These sections conferring jurisdiction are adaptations from the English Bankruptcy Acts. S. 5 of the Act of 1890 can be traced to ss. 65 and 66 of the *Bankruptcy Act* 1869, and it has been stated that s. 6 bears much resemblance to s. 12 of 12 & 13 Vict. c. 106 (q). S. 5 of the Act of 1897 is adapted from s. 102 of the *Bankruptcy Act* 1883. Such being so, English decisions are of service in interpreting the extent of the jurisdiction referred to.

The like jurisdiction contained in s. 5 (1), Act of 1897, was conferred on the English Bankruptcy Courts by the Act of 1869, s. 72, and the same was held to be of a discretionary nature (r).

(o) S. 5 (1), Act of 1897.

(p) *Ibid* (2).

(q) *In re Healey*, 2 V.R. (1.), 39.

(r) *Ex parte Dickin, re Pollard*, 8 C.D., 377; *Ex parte Reynolds, re Barnett*, 15 Q.B.D., 169.

it being interpreted that the Legislature introduced into the section the words "which the Court deems it expedient or necessary to decide," because it thought that it could trust the Court of Bankruptcy not to exercise the jurisdiction unless it really was expedient to do so (*s*). Then a distinction was made between transactions void as against the bankrupt himself and those not void as against him but void as against his trustee, and thus it was held that where the trustee takes only that which the bankrupt should have taken the matter should be left to the ordinary tribunals, but where by the operation of the bankrupt law the trustee claims by a higher and better title than the bankrupt, the matter is one which was intended to be dealt with by the Court of Bankruptcy (*t*). Such latter class would include questions of fraudulent preference, or a transaction impeached as an act of bankruptcy (*u*), questions arising under the Statute of Elizabeth which the trustee seeks to set aside as fraudulent (*v*), avoidance of voluntary settlements (*w*), and questions arising under the reputed ownership provisions. The rule, however, that cases in which the trustee had a higher and better title than the bankrupt should be tried in the Court of Bankruptcy was held not to be an inflexible nor an absolute one, and that in such cases also it was a matter of judicial discretion in each case how the question should best be tried with regard to all the circumstances of the case, and the Court was therefore not precluded from exercising a discretion not to assume the trial of such a case (*x*). Therefore, in cases where considerable property was at stake and questions affecting character were involved, it was held that an English County Court exercising jurisdiction in bankruptcy should not hear same, but that they should be tried by action in the High Court of Justice (*y*), and similarly cases involving the settlement of a trade custom (*z*). The cases cited are those in which the particular matters referred to were brought before a County Court having bankruptcy jurisdiction, and not the London Bankruptcy Court, which the Insolvency Court of this colony more nearly resembles, and which it has been pointed

(*s*) *Ex parte Dickinson*, *supra*, at p. 387.

(*t*) *Ex parte Brown*, *re Yates*, 11 C.D., 148.

(*u*) *Ibid.*

(*v*) *Ex parte Butlers*, *re Harrison*, 14 C.D., 267.

(*w*) *Vide s. 72, Act of 1890.*

(*x*) *Ex parte Armitage*, *re Learoyd*, 17 C.D., 13; *Ex parte Reynolds*, *re Barnett*, 15 Q.B.D., 169.

(*y*) *Ex parte Armitage*, *supra*; *Ex parte Price*, *re Roberts*, 21 C.D., 553.

(*z*) *Ex parte Reynolds*, *supra*.

**CHAP. I.**

Jurisdiction in  
the recovery of  
debts.

out should exercise a more extensive jurisdiction under the section than the County Court (*a*), and thus if a large sum were at stake in a case arising in the bankruptcy within the district of the London Bankruptcy Court, and the Chief Judge decided to try the case with a jury, the Court of Appeal would not be inclined to interfere (*b*). A simple money demand by the trustee of a bankrupt's property was held to come under the class of cases which it was not expedient for the Court of Bankruptcy to deal with (*c*). Express jurisdiction, however, is given to the Court of Insolvency by s. 96, Act of 1890, to the extent of £250 in the recovery of debts in the Court (*d*).

By the section referred to, the trustee may by summons call upon any person alleged to be indebted to the insolvent estate to pay the amount of such indebtedness, and the Court may order that such person forthwith or at such time and in such manner by instalments or otherwise as to the Court may seem expedient pay the amount, if the same does not exceed two hundred and fifty pounds, to the trustee.

Nature of s. 96,  
Act of 1890.

The terms of such section it was held in *In re Marie*, 3 A.J.R., 63, are obligatory, and, upon adequate materials being presented to it, the Court ought to make the order when the trustee seeks its aid to compel payment of debts due to the estate. Further, it has been held in *Re Jobson*, 5 A.J.R., 154, that the language of the section is general without exception for difficult and complex cases, and where, therefore, a debtor had paid money to a creditor to induce him to enter into a composition the Court held upon the subsequent insolvency of the debtor that the trustee might recover under such section the amount so paid in fraud of the other creditors.

Other matters  
not included  
under s. 5 (1),  
Act of 1897.

The discretion in regard to the jurisdiction under s. 72 of the *Bankruptcy Act* 1869, if such existed, was held to be properly exercised in the case of *Ex parte Pannell, re England* (*e*). This case was a foreclosure action by an equitable mortgagee. The validity of this mortgage was denied by the trustee, who sought while the action was pending in the Chancery Division for an order of the Bankruptcy Court declaring that he was entitled to the premises comprised in the charge. In this he was unsuccessful.

(a) *Vide Ex parte Price, supra*, at p. 557.

(b) *Ibid*, per Brett, L.J.

(c) *Ex parte Dickin, in re Pollard*, 8 C.D., at p. 387; *Ex parte Musgrave, in*

*re Wood*, 10 C.D., 94.

(d) *Vide* s. 96, Act of 1890; *vide* Chapter II. hereof.

(e) 6 C.D., at p. 338, per Cotton, L.J.



ful, and it was held that it was not the intention of the Act that the Court of Bankruptcy should draw within its jurisdiction all property that may be claimed as against the trustee by a third party, and that the mortgagee in such case should not be deprived of his right to have the case decided in the ordinary tribunal. Neither does the section enable the Court of Bankruptcy to draw compulsorily within its jurisdiction property or the owners of property which is not vested in the trustee and not originally subject to the administration in bankruptcy (*f*), nor does it take away the jurisdiction of the Court of Chancery in a suit which would but for the bankruptcy be fit to be entertained by such Court (*g*).

The Court has no jurisdiction in matters which are not incident to the insolvency, as where there are conflicting claims to any part of an insolvent's property between parties who are strangers to the insolvency, and in which the trustee has no interest (*h*).

Jurisdiction in claims not incident to the insolvency.

It is provided by s. 5 (2), Act of 1897, that the jurisdiction given by the section shall not be exercised for the purpose of adjudicating upon any claim "not arising in the insolvency" unless all parties to the proceeding consent thereto, or the money or money's worth in dispute does not in the opinion of the judge exceed in value £500. There was no proviso to s. 72 of the *Bankruptcy Act* 1869. There is, however, a proviso to the like section of the *Bankruptcy Act* 1883, s. 102, to the effect that the jurisdiction given by the section shall not be exercised by the County Court for the purpose of adjudicating upon any claim "not arising out of the bankruptcy" which might previously have been enforced by action in the High Court unless all parties to the proceeding consent thereto, or the money, money's worth, or right in dispute does not in the opinion of the judge exceed in value £200. The Victorian enactment differs from the English in this very important particular, that it refers to claims "not arising in the insolvency," and the English to claims "not arising out of the bankruptcy." The words "arising out of the bankruptcy" have been said to apply to cases where, by the operation of the law of bankruptcy, the trustee has a higher and better

The proviso, sub-s. 2, s. 5, Act of 1897.

(*f*) *Re Motion Maule v. Davis*, 9 C.D., 51. L.R. Ch., 192.

(*h*) *In re Lowenthal, ex parte Beesty*, 13 Q.B.D., 238; vide *Ex parte Lyons*, L.R. 7 Ch., 494.

(*g*) *Ellis v. Silber*, 8 L.R., Ch., 83; and vide *Ex parte Smith, re Collie*, 2

**CHAP. I.** title than the bankrupt (*i*). The English proviso, therefore, applies to cases that do not fall within such description. Again, it has been stated, "Suppose that before bankruptcy there had " been a dispute between the bankrupt and A, then such a claim " does not arise out of the bankruptcy, and the trustee has only " the same claim as the bankrupt had " (*j*). It is difficult to contemplate regarding the authorities what is meant by claims " not arising in the insolvency," or the jurisdiction intended to be conferred, as all cases necessarily arise in it. As previously pointed out, the Court has not jurisdiction in matters not incident to the insolvency discretionary or otherwise. It is perhaps possible that a case may arise to which the proviso applies in which the Court, under s. 5 (1), Act of 1897, may deem it necessary in order to do complete justice or to make a complete distribution of property in any such case.

Objections to the extended jurisdiction of the Court.

By the trustee.

Though there are cases (*k*), where it has been held that the Court ought not to assume jurisdiction, still where the proceeding is not *in invitum*, but a person who has a claim against the property of the bankrupt, real or personal, is willing to submit the determination of his rights to the Court, it is wrong and reprehensible for the trustee to raise objections to the exercise of jurisdiction, and it is right that a stranger to the bankruptcy should be encouraged to come in and submit to the jurisdiction of the Court (*l*).

By other parties  
Time for taking  
objections.

Objections to the extended jurisdiction should be taken at the earliest opportunity, and it is too late to take the objection after the objecting party has taken the chance of a decision in his favour on the merits (*m*), and it has been pointed out that where the Court of bankruptcy had no jurisdiction it would be difficult to imagine any state of circumstances in which it would be too late to raise it, but where it is admitted that the Court has jurisdiction, and the cases where the objection may prevail are those in which under ordinary circumstances the Court would not exercise jurisdiction, the objection should be taken before the

(*i*) *Ex parte Reynolds, in re Barnett*, 15 Q.B.D., at p. 176.

(*j*) *In re Hawke, ex parte Scott*, 16 Q.B.D., 506.

(*k*) See *ante*, at p. 5.

(*l*) *Ex parte Fletcher, re Hart*, 9 C.D., 381.

(*m*) *Ex parte Swinbanks, re Shanks*, 11 C.D., 525; *Ex parte Butters, re Harrison*, 14 C.D., 265.

jurisdiction is exercised (*n*). Where also the party submits to an order being made in the Court, he cannot afterwards on appeal take the objection (*o*). CHAP. I.

Subject to the provisions of the Acts and rules a judge may exercise in Chambers the whole or any part of the jurisdiction of the Court excepting the matters and applications that must be heard and determined in open Court (*p*). Subject also to the same provisions any matter or application may at any time, if a judge thinks fit, be adjourned from Chambers to Court, or from Court to Chambers, and if all the contending parties require any matter or application to be adjourned from Chambers into Court it shall be so adjourned (*q*). Adjournment may also be made from the chief clerk to Court; *vide* r. 7.

Power of judge in Chambers.

Adjournment from Chambers to Court, and *vice versa*.

From chief clerk to Court.

The following matters and applications must be heard and determined in open Court, namely :—

Matters that must be heard in open Court.

- (a) Examinations under Part VII. of the principal Act.
- (b) Applications for certificates of discharge.
- (c) Applications to consider and the consideration of a composition.
- (d) Applications for the release of estates from sequestration.
- (e) Applications to set aside or avoid any settlement, conveyance, transfer, security, or payment, or to declare for or against the title of trustees or assignees to any property adversely claimed.
- (f) Applications for the committal of any person to prison.
- (g) Appeals against the rejection of a proof or applications to admit reject expunge or reduce a proof where the amount of proof exceeds Two hundred pounds.
- (h) Applications for the trial of issues of fact with a jury and the trial of such issues (*r*).

The effect of sec. 5, Act of 1890, and sec. 5, Act of 1897, is to

Injunctions.

(*n*) *Ex parte Butters*, ante, at p. 268.      (*q*) S. 4, Act of 1897; r. 8—compare  
 (*o*) *Vide ex parte Davies, re Sadler*, 19 C.D., at p. 91.      r. 9, *Bankruptcy Rules* 1886.  
 (*p*) S. 3, Act of 1897; r. 6—compare      (*r*) S. 3, Act of 1897; r. 6—compare  
 r. 6, *Bankruptcy Rules* 1886.      r. 6, *Bankruptcy Rules* 1886.

**CHAP. I.** give to the Court the power to grant injunctions (s). It has jurisdiction to grant in a summary way an injunction to restrain a person not a party to the insolvency proceedings from dealing with property alleged to have been fraudulently assigned before the insolvency, and the same may be granted *ex parte* (t). Such injunctions should not be granted without requiring an undertaking to be given for damages by the person obtaining the order (u). Under the *Bankruptcy Act* 1869 the English Bankruptcy Courts had the same power to grant injunctions as the Court of Chancery, and therefore could restrain proceedings in the other Courts. The *Supreme Court Act* 1890, s. 62 (5), limits the jurisdiction, and no cause or proceeding pending in the Supreme Court can be restrained by prohibition or injunction; therefore the jurisdiction of the Insolvency Court does not extend to that extent, but now having the powers of the Supreme Court by the effect of the sections referred to it can restrain proceedings in the County Court and inferior Courts (v); but an injunction to restrain proceedings should not be granted if the result were to have the matter tried twice (w).

Where there are proceedings pending in the Supreme Court an application may be made in that Court to stay the proceedings, and the Court would have to consider whether it was proper to do so, and whether the case ought to be tried in insolvency or not (x).

Interpleader.

The Court can issue a writ of *fi. fa.* (y), and where the goods are claimed adversely the Court has jurisdiction, on the application of the sheriff, to make an interpleader order (z). The sheriff should apply to the Court by way of motion (a).

Jurisdiction to amend and set aside orders.

The Court, under its general jurisdiction, has power to amend and set aside orders, which include a sequestration (b), and has

(s) *Vide Ex parte Reynolds, re Barnett*, 15 Q.B.D., at pp. 188, 189 and 192; *Ex parte Anderson, in re Anderson*, L.R., 5 Ch. Ap., 473; *vide also In re Healey*, 2 V.R. (1.), 34.

(t) *Ex parte Anderson, ante.*

(u) *In re Johnstone, ex parte Abraham*, 1 Morrell, 32; *Ex parte Anderson, ante.*

(v) *Vide ex parte Reynolds, in re Barnett*, 15 Q.B.D., 169.

(w) *Ex parte Smith, in re Collie*, 2 C.D., 51.

(x) *Vide Ex parte Reynolds, ante*, at p. 189.

(y) *Slack v. Winder*, 5 A.J.R., 72; *vide s. 17, Act of 1890*, and rr. 102 and 103.

(z) *Ex parte Sheriff of Middlesex, in re Buck*, 10 C.D., 575.

(a) R. 19, and *ex parte Streeter, in re Morris*, 19 C.D., 216.

(b) *Vide In re Dobson, Watson and Co.*, 16 V.L.R., 700; *In re Myers and Davis*, 17 V.L.R., 351; *In re Rowley*, 2 V.L.R. (1.), 50.

power to do so on being satisfied that the order has been improvidently made or that facts which should have been disclosed have been withheld from the judge, either through negligence or from some other cause (c). The omission to set out and value his security by the petitioning creditor is not a ground for setting the sequestration aside afterwards on the application of the insolvent (d).

The Court possesses the same powers, rights, incidents and privileges as the Supreme Court (e), and one of these is the right which the Supreme Court has of reviewing its own decisions. The Court is not bound to review its decision, but it is at liberty to do so if it likes (f). Jurisdiction to review decisions.

The Court has, in a proper case, power to re-open the matter after judgment; but it has refused to do so and to allow an adjournment to permit an affidavit to be filed for the purpose of corroborating statements in an insolvent's affidavit in support of dispensing with the condition required by s. 139, Act of 1890 (g). Re-opening matter after judgment.

Where the Court makes an order which it has no jurisdiction to make it can be restrained by the Supreme Court by writ of prohibition from enforcing such (h); but the Supreme Court has no jurisdiction by *certiorari* over the Court of Insolvency (i). Prohibition and certiorari.

No action can be brought or suit instituted in any Court of law or equity to recover any chattels personal taken or claimed by any assignee or trustee, or the value thereof, or any damages in respect of the taking thereof, provided the value of such goods and chattels or such damages do not exceed the value of two hundred and fifty pounds, but the Court of Insolvency may decide the right of property in any such chattels upon the application of the assignee, trustee or any person claiming to be entitled thereto, and may make such order for the delivery up to or retention of such chattels by the assignee or trustee or such persons, or, if the same shall have been sold, then for the payment of the value thereof, and if any damages are claimed for the payment of such amount as may be awarded by the Court out of the estate of the Jurisdiction as to the right of property in chattels.

(c) *In re Bruce*, 12 V.L.R., at p. 709.

(d) *In re Rowley*, 2 V.L.R. (I.), 50-51.

(e) S. 5, Act of 1890.

(f) *In re Murphy*, 8 V.L.R. (I.), at p. 20; *Re McIntyre*, 7 A.L.T., 35;

*Re Watson*, 2 A.L.R., 210.

(g) *In re Fisher*, 1 A.L.R., 99.

(h) *In re Sinclair, ex parte Watson*, 15 V.L.R., 738.

(i) *In re Slack*, 2 V.R. (L.), 135.

**CHAP. I.** insolvent or by the assignee or trustee or such person as the Court may think fit to the person entitled thereto (*j*).

S. 5, Act of 1897, referred to, apparently gives a more extended jurisdiction in this matter than s. 16, Act of 1890.

Cases where the provision does not apply.

It was said prior to the passing of the Act of 1897 that s. 16, Act of 1890, limited s. 6 of that Act, giving original jurisdiction in all matters of insolvency, which it was said must be exercised with relation to all the provisions of the Act (*k*). The section applies only where the goods remain specifically in the hands of the defendant at the date of sequestration (*l*), or where the assignee might have claimed the goods before a sale (*m*). This provision does not include an action for conversion of goods, and such an action may be brought in the Supreme Court against the assignee, although the value of such goods does not exceed £250 (*n*). The application is made by motion (*o*). A dealer gave an order to an auctioneer, shortly before his insolvency, to sell certain furniture of his, and with the proceeds to pay certain creditors. The assignee proceeded under this section to set the transaction aside as a fraudulent preference. The Court held that the transaction was a fraudulent preference, and the creditors who had received the proceeds appealed, and it was held that the section did not apply to such a case, and that the Court below had no summary jurisdiction in the case under that section, and allowed the appeal (*p*). Where the value of the goods exceeds the statutory amount, the section confers no jurisdiction, although the amount claimed for an illegal sequestration or detention be less than that sum (*q*).

Power of Court to order delivery of property admittedly belonging to insolvent.

If any person on examination before the Court admits that he has in his possession, or under his control, any property belonging to the insolvent, the Court, during or at the close of the examination, or at any time thereafter, may, on the application of the trustee or any person interested, order him to deliver to the trustee such property or any part thereof at such time and in such manner and on such terms as to the Court may seem just, and with or without costs of the examination and order (*r*).

(*j*) S. 16, Act of 1890.

(*k*) *Cain v. Allen*, 4 A.J.R., 130.

(*l*) *In re Thompson*, 5 A.J.R., 3.

(*m*) *Ibid*.

(*n*) *Chapman v. Carolin*, 20 V.L.R., 71; *Cain v. Allen*, 4 A.J.R., 158.

(*o*) *Vide* Chapter II., "Practice," and r. 33, *et seq*.

(*p*) *In re Maley*, 4 A.J.R., 49.

(*q*) *Cain v. Allen*, 4 A.J.R., 130.

(*r*) S. 111 (5), Act of 1897—compare *Bankruptcy Act* 1883, s. 27 (5).

On the jurisdiction given to the English Bankruptcy Court by **CHAP. I.** s. 72 of the *Bankruptcy Act* 1869, adopted by s. 5 of the Act of 1897, it was held that a simple money demand by the trustee came under the class of cases which it was not expected to be dealt with by the Court of Bankruptcy (*s*). The Act of 1890 contains a provision not adopted from the English Acts, conferring jurisdiction to the amount of £250, and by such the trustee may, by summons, call upon any person alleged to be indebted to the insolvent estate to pay the amount of such indebtedness by instalments or otherwise (*t*).

Jurisdiction as to recovery of debts.

The Court, if any person on examination before it admits that he is indebted to the insolvent, may, during or at the close of the examination or at any time thereafter on the application of the trustee or any person interested, order him to pay to the trustee at such time and in such manner as the Court deems expedient, the amount admitted, or any part thereof, either in full discharge of the whole amount in question or not, as it thinks fit, and with or without costs of the examination and order (*u*). A written form of admission is given in Form 114, *post*, and the order to pay is Form 115.

Power of Court to order payment of admitted debt.

Form and order as to same.

As to the jurisdiction relating to deeds of arrangement, *vide* Chapter XI, "Deeds of Arrangement."

Jurisdiction as to deeds of arrangement.

Any judge, after sequestration under Part III., Act of 1890, or adjudication of sequestration, at the request in writing of the majority in number of the creditors who have proved debts, must, and upon the like request of the assignee or trustee may, direct that all or any part of the proceedings in any estate attached to his district be conducted in some other district (*v*). The order is Form No. 43. The request of creditors to transfer proceedings must be accompanied by an affidavit of some solicitor of the Court verifying the signatures of the creditors signing the request, and stating that such creditors are all or the majority in number of those (as the case may be) who have proved debts in the estate (*w*). The party obtaining the order must send by post a sealed copy of the order to the chief clerk of the Court of the

Jurisdiction as to transfer of proceedings.

Form of order.

Affidavit in support.

Papers.

(*s*) *Ex parte Dickin, in re Pollard*, 8 C.D., at p. 387; *Ex parte Musgrave, re Wood*, 10 C.D., 94.

(*t*) *Vide* s. 96, Act of 1890. As to procedure, *vide* Chapter II., and r. 33, *et seq.*

(*u*) S. 111 (4), Act of 1897—compare *Bankruptcy Act* 1883, s. 27 (4).

(*v*) S. 9, Act of 1890—compare 32 & 33 Vict. c. 71, s. 80 (5).

(*w*) R. 15.

**CHAP. I.** district affected by the order (x). Where the proceedings in any matter are transferred the chief clerk of the first district must send by post the records of proceedings transferred to the chief clerk of the district to which the transfer is made (y).

Nature of section.

As the amount of the creditors for removal is not a matter of voting, s. 26, Act of 1890, which deals with voting, cannot be said to have any reference to it any more than that section has to s. 131, Act of 1890, dealing with composition and release where the words "in number" occur (z). If it did have application no transfer could be made if the majority of the creditors in the estate was made up of creditors under £25, which are not referred to in number by the section referred to. If the order has been duly made transferring the proceedings, a subsequent order made *ex parte* upon the application of the official assignee directing that no further action should be taken on the former order is bad, and will be reversed (a). Where the order is proved to have been made erroneously, it is open to review upon an application made promptly to the judge who made it (b). The order for removal is an effectual one, as, for instance, an insolvent's certificate was refused at the Horsham Court with leave to renew his application at the next sitting of that Court, but in the meantime the proceedings were removed to the district of Melbourne, and it was held that the judge of the district to which the proceedings were removed had jurisdiction to entertain the renewed application, notwithstanding the order of the Horsham Court (c).

Transfer of proceedings commenced in wrong district.

When any insolvency proceeding has been commenced in a district in which it should not have been commenced, the judge of the Court of such district may order that the proceedings shall be transferred to the district in which the same should have been commenced, or that it be continued in the district in which it was commenced; but unless and until a transfer is made under the rules the proceeding continues in the district in which it was commenced (d). A chief clerk has only jurisdiction in the particular district for which he is chief clerk,

(x) R. 16—compare r. 20, *Bankruptcy Rules* 1886.

(y) R. 17—compare r. 23, *Bankruptcy Rules* 1886.

(z) *Vide In re Keogh*, 7 A.L.T., 79.

(a) *In re Cotton, ex parte Goulstone*, 6

V.L.R. (I.), 24.

(b) *In re Clarton*, 5 V.L.R. (I.), 47.

(c) *In re Hinneberg*, 8 V.L.R. (I.), 7-10.

(d) R. 18—compare r. 25, *Bankruptcy Rules* 1886.



and consequently a petition wrongly received by him would be CHAP. I.  
 inoperative notwithstanding this rule (e).

As to jurisdiction as to costs, and costs generally, *vide* Chapter Jurisdiction as to costs.  
 II.

In any insolvency or any other proceeding within the jurisdiction of the Court the parties concerned or submitting to such jurisdiction may, at any stage of the proceedings, by consent, state any question or questions in a special case for the opinion of the Court, and the judgment of the Court is final unless it be agreed and stated in such special case that either party may appeal, and the parties may, if they think fit, agree that upon the question or questions raised by such special case being finally decided a sum of money, fixed by the parties, or to be ascertained by the Court, or in such manner as the Court may direct, or any property, or the amount of any disputed debt or claim, shall be paid, delivered, or transferred by one of such parties to the other of them, either with or without costs (f). Jurisdiction as to questions raised by consent or by special case.  
  
Special case for opinion of Insolvency Court.

The Court may, if it thinks fit, upon the request of any party to the proceeding, transmit any question of law by way of special case to the Supreme Court, which has full power to determine the same. The decision of the Supreme Court, as certified by the prothonotary thereof, must be forwarded to and filed in the Court whence such special case shall have been transmitted, and is binding upon the Court (g). Jurisdiction as to special case for Supreme Court.

In any case in which the Court, in consequence of the opposition of any person or at the instance of any person, transmits any question of law by way of special case to the Supreme Court, there must be stated in such special case the name or names of the person or persons at whose instance, or in consequence of whose opposition such special case has been transmitted, and such person or persons are deemed to be a party or parties thereto (h). Names of parties.

The Supreme Court has full power in respect to the costs of a special case, or may if it think fit reserve the question of such costs for the consideration of the Court (i). Costs of special case.

(e) Ss. 4 and 10, Act of 1890. *Vide Reg. v. Poole*, 3 V.R. (L.), 181; *vide* also "Territorial Jurisdiction of Judges," *post*.

(f) S. 15, Act of 1890—compare Order 34, *Supreme Court Rules* 1884.

(g) S. 9 (1), Act of 1897—compare s.

135, *County Court Act* 1890, and *Mines Act* 1890, s. 209; and *vide Crawford v. Rankine*, 13 V.L.R., 690; *Anderson v. Coyle*, 3 W.W. & A'B. (M.), 10; *Stevens v. Webster*, 3 W.W. & A'B. (M.), 23.

(h) S. 9 (2), Act of 1897.

(i) *Ibid* (3).

## CHAP. I.

Rules as to  
special case.

The rules referring to this class of special case are rr. 160 to 164, *post*, based on the *County Court Rules* 1890, rr. 375 to 381, and as to such rules *vide* *Hunt v. Barbour*, 3 V.L.R. (L.), 189; *Reg. v. Hackett, ex parte Goodson*, 5 V.L.R. (L.), 357; *Enders v. Rouse*, 11 V.L.R., 827; *Kelly v. Woodlands Saw Mills Coy.*, 12 V.L.R., 892.

Territorial  
jurisdiction of  
judges.

The Governor-in-Council may from time to time, by notice in the *Government Gazette*, assign one or more districts to all or such one or more of the judges of the Court as he may think fit, and appoint places at which and the periods within which the Court shall be held within such districts, and may in like manner revoke any such appointment or alter such places and periods (*j*). By Order-in-Council dated 11th January, 1875, districts were assigned to individual judges conforming to the bailiwicks, but a fresh assignment was made on 9th July, 1888, when the districts were respectively and collectively assigned to the judges of the Court of Insolvency as and to the insolvency districts in which they are to exercise jurisdiction as such judges under the Act as follows:—Central, Midland, Northern, Eastern, Southern and Western Districts (*j*<sup>2</sup>).

Auxiliary juris-  
diction.

Assuming the Court of Insolvency to be a British Court, it has jurisdiction to act in aid of and auxiliary to the High Court of Justice and all other British Courts having jurisdiction in bankruptcy or insolvency. The jurisdiction is conferred by the Act 46 & 47 Vict. c. 52, s. 118, which is as follows:—The High Court, the County Courts, the Courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those Courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the Court seeking aid with a request to another of the said Courts shall be deemed sufficient to enable the latter Court to exercise in regard to the matters directed by the order such jurisdiction as either the Court which made the request or the Court to which the request is made could exercise in regard to similar matters within their respective jurisdictions.

In an application made to the Court of Insolvency to exercise

(*j*) S. 8, Act of 1890—last paragraph. is given in s. 4, Act of 1890, and r. 3.  
(*j*<sup>2</sup>) A meaning of the term "district"

the provisions of the section (*k*), it was said: "The question has been brought before the Court—is the Court of Insolvency in Victoria a 'British Court' within the meaning of s. 118 of the *Bankruptcy Act* 1883? The Supreme Court did not decide the question (*l*), and as the order treats our Court as a British Court, s. 118 applies to Victoria" (*k*).

A request to the Court from whom aid is sought is necessary as well as an order of the Court seeking aid, and the former Court exercises jurisdiction "in regard to the matters directed by the order," and the matters as to which aid is sought should be specifically stated, that is the classes of acts required to be done should be described so as to enable the Court empowered to exercise the jurisdiction to know on what subjects such power is to be exercised (*m*).

Aid required to be specifically set out in the order.

By virtue of the same section, a request to the Court exercising insolvency jurisdiction at Brisbane was ordered to be issued for the examination by that Court of a Victorian insolvent (*n*).

Australian Courts auxiliary to each other.

As to the colonial Courts invoking the aid of the English Court, *vide In re Mann and others*, 13 V.L.R., at p. 593.

English Courts.

### 3.—TRIAL BY JURY.

If in any proceeding in the Court there arises any question of fact which the parties desire to be tried by a jury instead of by the Court itself, or which the Court thinks ought to be tried by a jury, the Court may direct such trial by a jury to be had before itself or some other competent Court accordingly, and settle the form in which such question of fact is to be stated for trial, and give all necessary directions for the purpose of such trial (*o*). The question is one which "the parties desire," or the Court thinks ought to be tried by a jury. The judge must exercise a judicial discretion whether the question of fact should be so tried, and one party is not entitled as of right to demand a jury. Where the order was made on the demand of one party only, the

Trial of question of fact by a jury.

(*k*) *Re Lister, Henry and Co.*, 9 A.L.T., at p. 153.

(*l*) *Vide In re Mann and others*, 13 V.L.R., 590; S.C., *sub nom.*, *Re Lister, Henry and Co.*, 9 A.L.T., 93.

(*m*) *In re Mann and others*, *ante*.

(*n*) *In re Turnbull, Argus*, 24th March, 1886. Requests have issued for other colonies.

(*o*) S. 6 (1) Act of 1897—compare *Bankruptcy Act* 1883, s. 102 (3), and see *Bankruptcy Act* 1869, s. 72.

## CHAP. I.

order was held to be irregular only, and the same could be waived as by appearing on the trial without taking the objection (*p*).

Mode of trial by a jury.

If such trial take place before the Court or in the Supreme Court it must be had in the same manner as if it were the trial by a jury of an issue of fact in an action in the Supreme Court, and if such trial take place in any other Court it must be had in the manner in which jury trials in ordinary cases are by law held in such Court (*q*). Where the question has been tried by a jury in the Court the Court cannot set aside or disregard the verdict unless there was no evidence to go to a jury, or owing to some point of law or of some new fact the verdict has become immaterial

New trial.

to the decision (*r*). In the event of there being evidence to go to a jury, and if the verdict is in the opinion of the Court against the weight of evidence, the proper course to adopt to get rid of the verdict is to order a new trial (*r*). Where a large amount is at stake, or where serious questions of character are involved (*s*), the direction should not be to the County Court. A question of a custom or habit, unless it has been tried often enough to be judicially noticed, should be tried in the Supreme Court before a jury so as to get the question settled in such a way that the Courts will in the future adopt the conclusion (*t*).

Finding of jury to be certified to the Court.

If a trial be had elsewhere than in the Court the finding of the jury must be certified by the associate or other proper officer to the Court, which must make such order in the matter as it thinks fit (*u*).

Power to grant new trial.

In every case the Court before which the trial is had may grant a new trial if it thinks fit, and for such purpose the ordinary rules of practice and procedure in such Court apply (*v*).

Application of provisions of *Juries Act 1890*.

For the purposes of trials with a jury all the provisions of the *Juries Act 1890*, and any Act amending the same so far as the

Duties of chief clerk as to trials with jury.

same relate to civil trials apply (*w*), and the chief clerk in relation to all trials with a jury performs the same duties and functions as the Registrar of the County Court performs in relation to the County Court (*x*).

(*p*) *Ex parte Morgan, re Simpson*, 2 C.D., 72.

(*q*) S. 6 (2), Act of 1897.

(*r*) *Ex parte Morgan, ante*.

(*s*) *Vide Ex parte Armitage, re Leary*, 17 C.D., 13; *Ex parte Price, re Roberts*, 21 C.D., 553.

(*t*) *Ex parte Reynolds, in re Barnett*, 15 Q.B.D., at pp. 184, 185.

(*u*) S. 6 (3), Act of 1897.

(*v*) S. 6 (4), *Ibid*.

(*w*) S. 6 (5), *Ibid*.

(*x*) S. 6 (6), *Ibid*.

The rules as to the settlement of issues and as to trial by jury are rr. 110 to 122, *post*. CHAP. I.

The form of issues of fact for trial is No. 121, *post*. The precept follows the form in the sixth schedule to the *Juries Act* 1890, and the form of oath to be administered to officer of Court taking charge of jury is No. 179.

Rules as to  
issues and trial  
by jury.  
Form of issues  
of fact, precept  
and oath.

#### 4.—APPEALS.

In insolvency matters there are three classes of appeals to the Full Court:—Firstly, those from the decisions of Supreme Court judges under Part IV. of the Act of 1890 dealing with compulsory sequestrations, and which are regulated by s. 36 of the *Supreme Court Act* 1890, and rr. 9 and 15 of Order 58, *Supreme Court Rules* (Judicature); secondly, appeals from the decisions of the Court of Insolvency regulated by s. 11 of the Act of 1890, and rr. 158 and 159, and rr. 2 and 10 of the *Rules of Supreme Court* 1884 (*y*); and thirdly, appeals from any order made by a police magistrate under s. 112 of the Act of 1897, in respect to which all the provisions of the Insolvency Acts relative to appeal are applicable (*z*). The first class is dealt with in Chapter IV. As to appeals from decisions of the Court of Insolvency, s. 11 of the Act of 1890, and r. 2 of the *Supreme Court Rules* 1884, are not affected by the provisions of the *Supreme Court Act* as to appeals (*u*). The *Judicature Act* specifically affected English bankruptcy appeals, and the time there for appealing runs from the signing, and not from the pronouncing, of an order as set out in s. 11 of the Act (*b*).

Classes of ap-  
peals.

Any person desirous of appealing from any order of the Court or of a police magistrate is entitled to appeal against such order to the Supreme Court—(1.) Upon giving notice within fourteen days next after the same shall have been pronounced of such desire to the opposite party. (2.) Together with a statement in writing setting forth briefly and distinctly the grounds on which it is intended to support such appeal. (3.) And in all cases except appeals against the granting, suspension or refusal of any certificate upon also paying into Court within the like time the

Appeals from  
Court of  
Insolvency and  
police magis-  
trate.

(y) See *post*, Appendix.

(z) S. 112 (3), Act of 1897.

(a) *In re Bruce*, 12 V.L.R., p. 696.

(b) *Vide Ex parte Viney, in re Gilbert*, 4 C.D., 794; *Ex parte Garrard, in re Leuer*, 5 C.D., 61.

## CHAP. I.

sum of twenty pounds as security for costs to abide the event of such appeal. The Supreme Court may, on such appeal, confirm, reverse or vary such order with or without costs as it may think fit, and such appeal is heard at such times and subject to such directions as the judges of the Supreme Court by any rule or order direct. The judge who made the order appealed against must forward to the Supreme Court a copy of his notes of the evidence taken before him together with a statement of his reasons for making such order (c).

Appeal not to operate as stay of proceedings.

No proceedings under any order so appealed against are stayed pending such appeal except by the order of the Court on such terms as to costs, security, or otherwise as the Court may think proper to impose (d). "Court" in this latter paragraph means the Court of Insolvency (e). The time runs from the pronouncing of the order (f), and in the computation of time the number of days is to be reckoned exclusively of the first day and inclusively of the last day (g). The order must be drawn up, as otherwise the appeal will not be entertained (h).

Time for appealing.

The order must be drawn up.

"Opposite party."

The words "opposite party" mean a person who in fact opposes an application, and it is not necessary to serve a notice of appeal on all the persons who were called upon to show cause against a rule *nisi* under r. 140 in composition proceedings unless such persons actually opposed the rule *nisi* (i). No form of notice is given in the schedule of forms, but one usually used is as follows:—

IN THE COURT OF INSOLVENCY	}	The Insolvency Acts.
District.		
		In the matter of
		and
		In the matter of

Form of notice of appeal.

TAKE NOTICE that the above-named, A.B. intends to appeal to the Supreme Court sitting as the Full Court against the order of this Court of Insolvency dated the                      day of                      Whereby it was ordered [set out the terms of the order]. And that the said appeal will be made on the                      day of                      next, or so soon thereafter as counsel can be heard herein. And further take notice that the following are the grounds on which it is intended to support the said appeal :

(c) S. 11, Act of 1890 ; s. 112 (3), Act of 1897.

(d) *Ibid.*

(e) *Re Hull*, 9 A.L.T., 224 ; and by s. 112 (3), Act of 1897, the expression will include the police magistrate.

(f) S. 11, Act of 1890.

(g) *Vide Watson v. Issell*, 16 V.L.R., 607. *Vide* Chapter II. as to computation of time.

(h) *In re Murphy*, 1 V.L.R. (I.), 50.

(i) *In re Cromie, ex parte The Real Estate Bank*, 20 V.L.R., 124 ; 15 A.L.T., 248.

## CHAP. I.

day of

**Solicitor for the said A.B.**

Service.

**Amendment of notice.**

### Deposit in certificate appeals.

**Payment of  
deposit into  
Court.**

**Production of papers in Supreme Court on appeal.**

**Judge's notes  
and reasons.**

(n) *In re Goldsmith*, ante.

(o) *In re Thonemann*, 13 V.L.R., pp. 204, 207.

(p) *Re Foley, ex parte Giles*, 2 A. L. R., 206. In this case it was indicated that the respondent, to be successful in an application for the costs of such motion should make it plain to the other side what the costs amount to, and ask for them.

(q) R. 159, and *vide* s. 11, Act of 1890.

## CHAP. I.

Transmission to  
prothonotary.

The proper officer to whom the copy notes with the statement of judge's reasons are to be transmitted is the prothonotary (*r*), and the notes will not be varied either on the statement of counsel or on affidavit (*s*).

Re-statement of  
notes and  
re-hearing.

Where, however, a question remained indefinite the Court remitted the case to the insolvency judge to determine the fact (*t*), and when the case stated was vague it was remitted to the judge below to fully re-state the evidence and his reasons (*u*). But there is apparently no power in the Supreme Court to remit the case for re-hearing (*v*), but cases have been remitted to the insolvency judge, on the one hand leaving him to direct the method of proceeding (*w*), on the other "to deal with," with an intimation of the Full Court views (*x*). The provision, so far as the notes of evidence are concerned, necessarily only applies to cases where evidence is taken (*y*), but it is of the utmost importance that the provision generally should be complied with (*z*).

Appeal from  
special cases  
submitted to  
Insolvency  
Court :

The judgment of the Court is final on a special case submitted to it under s. 15, Act of 1890, unless it is agreed and stated in such special case that either party may appeal (*a*).

From judicial  
and ministerial  
orders :

From Order-in-  
Chambers :

From order  
approving of  
release :

From certificate  
applications :

From order re-  
fusing insolvent  
to be examined  
on his own  
behalf.

The section contemplates that every order, judicial or ministerial can be appealed from, and therefore an appeal lies from an order confirming the appointment of a trustee (*b*), and from an order in chambers made by a judge (*c*), and a creditor may appeal against the order approving of a release under s. 14 (1), Act of 1897, even if he has not proved his debt, as he is bound by the order (*d*). An appeal also existed from the decision of the judge where he had dispensed with the condition imposed by s. 139, Act of 1890 (*e*), and also where he refused to dispense with the condition of

(*r*) R. 10, *Supreme Court Rules* 1884.

(*s*) *Vide In re M'Intyre*, 11 V.L.R., p. 312.

(*t*) *In re Gamble*, 19 V.L.R., at pp. 628-9; 15 A.L.T., 174.

(*u*) *In re Ruddock*, 5 V.L.R. (I.), at pp. 54 and 55.

(*v*) *Vide In re Aarons*, 6 V.L.R. (I.), at p. 70.

(*w*) *In re Ruddock*, 5 V.L.R. (I.), at p. 55.

(*x*) *In re Cromie, ex parte The Real Estate Bank*, 20 V.L.R., at p. 130; 15

A.L.T., p. 248.

(*y*) *In re Mackay*, 2 V.R. (I.), at p. 23.

(*z*) *Vide In re J. B. Davies*, 17 A.L.T., 261; 2 A.L.R., 39.

(*a*) S. 15, Act of 1890.

(*b*) *In re Mackay*, 2 V.R. (I.), 22, 23.

(*c*) *In re Clarton*, 5 V.L.R. (I.), 47.

(*d*) *Vide In re Langtry, ex parte Stevenson*, 63 L.J.Q.B., 570; 1 Manson, 169.

(*e*) *Re Dyte*, 2 V.L.R. (I.), 42.



obtaining the certificate (*f*); and apparently it would also lie from a refusal to allow an insolvent to be examined on his certificate application (*g*). CHAP. I.

Where there is evidence on which the judge might reasonably find a fact, the Supreme Court will not disturb his finding on appeal (*h*). An irregularity in the action of the insolvency judge in the hearing of a certificate application is not a matter of appeal (*i*). S. 11, Act of 1890, enacts that any order of the Court may be appealed from, and Order 58, r. 1, *Rules of the Supreme Court* (Judicature), enacts that the whole or any part of any judgment or order may be appealed from, and under the latter order, where the determination complained of was merely the exercise of the discretion of the judge, the same cannot be appealed from unless the judge has declined to exercise his discretion, or has manifestly proceeded on the wrong ground (*j*). The exercise of the judge's discretion in refusing to receive an affidavit from an insolvent on certificate proceedings is an instance where the Court is slow to entertain an appeal (*k*). Appeals as to costs are in the same category, and as a rule will not lie, as where the judge has exercised his discretion, and there are no peculiar circumstances to affect it on matter of principle (*l*). Appeal on question of fact.  
Irregularity in action of judge.  
Discretionary matters and appeals not allowed.  
Appeals as to costs.

Appeals to the Privy Council are dealt with under the provisions of the Order-in-Council, 9th June, 1860, Victorian Statutes 1890, Vol. IV., p. 3232, and the amending rules published in the *Government Gazette* 1896, at p. 2637, and also under the *Supreme Court Act* 1890, ss. 231-233. The question of the "appealable amount" is determined by considering all the merits of the case, and in an application to expunge a proof of a debt amounting to £57,050 it was considered that the matter involved not only the share which the creditor's debt entitled it to have out of the estate, but also many other rights for which the whole of its debt would be an important factor, and leave to appeal granted (*m*); and leave was Appeals to the Privy Council.  
"Appealable amount."

(*f*) *Vide In re McIntyre*, 11 V.L.R., at p. 319.

(*g*) *Vide In re Aarons*, 6 V.L.R. (I.), 56.

(*h*) *In re Summers, ex parte Hasker*, 10 V.L.R. (I.), 78.

(*i*) *In re Were*, 6 V.L.R. (I.), at p. 44.

(*j*) The cases on this point and others where appeals are not allowed are collected in the Annual Practice

under Order 58, r. 1.

(*k*) *In re Michael*, 5 A.J.R., 64.

(*l*) *Vide United Hand-in-Hand and Band of Hope Company v. National Bank of Australasia*, 4 V.L.R. (E.), 173. The cases on appeals as to costs generally are collected in the Annual Practice under Order 65, r. 1.

(*m*) *In re Yencken*, 19 V.L.R., p. 557; 15 A.L.T., p. 149.

**CHAP. I.** granted on the ground that the matter was of sufficient amount from a decision of the Court refusing to expunge a proof for £53,587 on the application of a creditor for £288 (*n*). On an application for leave to appeal by a petitioning creditor it was held that the value of the debtor's estate and not the amount of the petitioning creditor's debt is to be regarded in estimating the amount of the matter in issue (*o*), and where a debtor obtained registration of a composition under the provisions of the Act, and an application by a creditor to set the same aside having been refused by the Court of Insolvency and on appeal by the creditor, the matter having been remitted to the Court of Insolvency to be heard, leave to appeal from such direction of the Full Court was refused, as the decision of the Full Court was not one determining the merits of the case (*p*).

**Costs of appeals.** As to costs of appeals, *vide* Chapter II.

#### 5.—JURISDICTION AS TO PENALTIES AND OFFENCES AND AS TO COMMITMENTS.

**Trustee.**

Jurisdiction as to penalties and offences under the Acts is exercised by the Court in some instances and by the Supreme Court in others. As to the Court, besides its powers of removing trustees (*q*), it can for the improper use or retention of money of the estate, under s. 89, Act of 1890, and ss. 53 (2), 54 (6), Act of 1897, penalise the trustee, under the latter section without prejudice to any other liability, civil or criminal, at the rate of 20 per cent. per annum on money so used, as well as dismiss him from his office, with costs, and it may also disallow all or any part of his charges (*r*). Where solicitation has been used by or on behalf or with the consent of a trustee in obtaining proxies, or in procuring the trusteeship, except by direction of a meeting of creditors, the Court has power, if it think fit, to order that no remuneration be allowed, in the terms of s. 19, Act of 1897 (*s*), and where the trustee neglects or refuses to pay any dividend, the Court may order him to pay same and also to pay out of his own money interest thereon for the time that it is withheld, at such rate as it

(*n*) *Ex parte Rolfe and Bailey, in re Rutledge*, 2 W. & W. (I.), 51.

(*o*) *In re McDonald*, 2 V.R. (I.), 12.

(*p*) *In re Cromie, ex parte Real Estate Bank*, 20 V.L.R., 131; 15 A.L.T., p.

258; *vide also Rocke Tompsitt v. Wilson*, 13 V.L.R., 833.

(*q*) *Vide* Chapter V.

(*r*) S. 125, Act of 1890.

(*s*) *Vide* Chapter V. and r. 277.

may fix, and costs of the application (*t*). The official accountant may, in writing, require the trustee to make good any loss the estate of the insolvent may have sustained by his misfeasance, neglect or omission, and if he neglect to do so, the Court, on report from the official accountant, after hearing the explanation (if any), of the trustee, must make such order in the premises as it thinks just (*u*).

The Court may have the insolvent arrested, and his books, papers, money and goods seized (*v*) under the circumstances set out in Chapter VI. hereof, "The Insolvent," and may punish the insolvent for contempt of Court under s. 128 (*w*), and may commit insolvent and other witnesses under s. 135 (*x*), and may impose the penalties prescribed by ss. 140, 141, 142 and 148, Act of 1890, in reference to the conduct of the insolvent (*y*), and also the penalty prescribed by s. 156 (3), Act of 1890, as to receiving or to concealing property under attachment. As to this subject, *vide* Chapter VI., "Insolvent."

The Court may commit any insolvent or other person whom it may believe to have committed or who may be charged before it with the commission of any indictable offence against the Insolvency Acts to take his, her or their trial either before the Supreme Court or a Court of General Sessions, and may grant or refuse bail to such insolvent or other person, and for the aforesaid purposes it has all the powers of a police magistrate (*z*). The application must be heard and determined in open Court (*u*).

The information must be verified by the affidavit of the informer, and must be filed together with such affidavit with the chief clerk at least fourteen days before the hearing; and an office copy of the information must be served upon the party informed against personally seven days at least before the day of hearing, and the hearing of such information is upon evidence *vivâ voce* in open Court, and conducted as nearly as may be as a trial at law (*b*).

(*t*) S. 43, Act of 1897.

(*u*) S. 70, *ibid*.

(*v*) S. 129, Act of 1890.

(*w*) *Vide* Chapter VI.

(*x*) *Vide* Chapter VII.

(*y*) *Vide* Chapter VIII.

(*z*) S. 8, Act of 1897—*vide* s. 7 also.

(*a*) S. 3, Act of 1897.

(*b*) R. 449. This rule also prescribes

that the information must contain a notice at the foot thereof "as in the appendix." The appendix does not appear to contain one unless a similar notice to that to form 145 is meant. As to general procedure on committing for trial, *vide Justices Act 1890, s. 39, et seq.*

**CHAP. I.**

On a certificate application the Court has power to commit an insolvent for trial for an offence under the Act, and at the same time, under s. 140, sentence him to imprisonment and refuse his certificate (c). The Court may commit an insolvent on an information charging more than one offence, notwithstanding s. 73 (1), of the *Justices Act* 1890 (d).

Penalty on  
bribed creditors.

The Court may also impose the forfeiture referred to in s. 147, Act of 1890 (e), upon a creditor induced by reward to forbear from opposing a certificate or to consent to the allowance of the same, or to forbear to appeal against a grant of the same. The Court for the purposes of the Acts has all the powers, rights and privileges of the Supreme Court, and the judges, when sitting in Chambers for the despatch of business, have the same and the like powers as are possessed by the judges of the Supreme Court sitting in Chambers (f), and all orders of the Court or judge are directed to be enforced in the same way as orders of the Supreme Court were enforced at the passing of the Act of 1890, or in such other mode as may be prescribed (g). It may therefore commit for contempt. The application must be supported by affidavit, which must be filed in the Court in which the proceedings are being prosecuted (h).

Contempt of  
Court.

Form of  
application and  
affidavit.

The application by the trustee for committal of insolvent or other person is form No. 131; the affidavit is form No. 132.

Hearing of  
application.  
Suspension of  
order.  
Forms of notice,  
order, and  
warrant.

As to the notice of hearing of the application and the suspension of issue of the committal order, *vide* rr. 100 and 101, *post*. The notice of application is form No. 133; the order of committal, No. 134; the warrant, No. 139.

Enforcement of  
order.

A warrant of the Court committing for contempt need not prescribe any time of imprisonment, and the mode prescribed for enforcing orders for contempt by the Court is the same as that prescribed by the Supreme Court (i). In a commitment for contempt under s. 128, Act of 1890, it has been held (j) that the Supreme Court will on *habeas corpus* examine the proceedings

Power of  
Supreme Court  
on *habeas corpus*.

(c) *In re Sampson*, 20 V.L.R., 105; 15 A.L.T., 233.

(d) *In re Ah Louey*, 1 A.L.T., 77.

(e) *Vide* Chapter VIII. hereof.

(f) S. 5, Act of 1890; s. 1, Act of 1897.

(g) S. 17, Act of 1890.

(h) R. 99.

(i) *In re Slack*, 2 V.R. (L.), 64. S. 17, Act of 1890.

(j) *Re Gray*, 2 V.L.R. (L.), 241. See also on this subject Chapter VI., "Insolvent."

and receive affidavits to ascertain whether there was evidence of the facts on which the warrant purports to have been based. CHAP. I.

The warrant committing for contempt need not prescribe any time for enforcement (*k*). The Court may commit for contempt for non-payment of costs (*k*). The unauthorised interference with property sealed up by attachment is a contempt (*l*), and so is the insolvent's failure to perform his duties under s. 128, Act of 1890, and disobedience of the order of the Court made on a motion to enforce the provisions of a composition is expressly made a contempt of Court (*m*). Further, any person who knowingly falsifies or fraudulently alters any document in or incidental to any proceeding under the Acts or rules is deemed guilty of contempt of Court, and is liable to be punished accordingly (*n*). Such penalty is cumulative to any other penalty, punishment, or proceeding to which such person may be liable (*n*). Examples of contempt.

Where the Court has power under the Acts to sentence, apprehend, or commit any person to prison, the commitment may be by warrant directed to such person as the Court may think fit and to such convenient prison as the Court thinks expedient, and every such warrant is sufficient authority to such person to act as therein directed, and to the keeper of such prison to detain the person sentenced, apprehended, or committed for the period named in such warrant (*o*). Commitment to prison by warrant.

The Supreme Court and Courts of General Sessions deal with persons wilfully making a false declaration in relation to liquida- The Supreme Court and Courts of General Sessions.

(*k*) *In re Slack*, 2 V.R. (L.), at pp. 64 and 135.

(*l*) *In re Bateman*, 2 V.L.T., 203.

(*m*) S. 154, Act of 1890. As to contempt of Court generally, *vide* Annual Practice, note to Order 44, r. 1, and *In re Syme*, *ex parte Daily Telegraph Newspaper Company*, 5 V.L.R. (L.), 291. *Re Syme*, *ex parte McKinley*, 6 V.L.R. (L.), 51; 1 A.L.T., 154. *In re Feigl*, *ex parte Herman*, 9 V.L.R. (L.), 143; 5 A.L.T., 20. *In re Harvard*, 4 V.L.R. (L.), 65. *Re Strong*, *ex parte Campbell*, 4 A.J.R., 150. *Williamson v. Courtenay*, 1 W. & W. (E.), 21. *Durbridge v. Scholes*, 6 W. W. & A'B. (E.), 1. *United Hand-in-Hand and Band of Hope Company v. National Bank of Australasia*, 4 V.L.R. (E.), 173. *In re Ballarat Patent Fuel, &c., Company*, 2 W.W. & A'B. (E.), 172. *Reg.*

*v. Wilson*, *ex parte Yates*, 3 A.L.T., 55. *In re Slack*, 2 V.L.R. (E.), 204; 4 V.L.R. (L.), 454. *In re Heron*, 5 A.J.R., 161. *In re Thompson*, *ex parte Johnston*, 1 W. & W. (L.), 24. *In re Bateman*, 6 W.W. & A'B. (I.E. & M.), 15, 24. *Slack v. Atkinson*, 4 V.L.R. (E.), 230. *Tyrrell v. Stewart*, 4 V.L.R. (E.), 60. *Ware v. Ware*, 4 V.L.R. (E.), 119. *Attorney-General v. Bentley*, 6 W.W. & A'B. (E.), 175. *In re Dakin*, 13 V.L.R., 522; 9 A.L.T., 62. *In re Daly* and *In re Winter*, 15 V.L.R., 402. *In re Cooper*, *ex parte Hall*, 16 V.L.R., 802. *In re Elsworth*, *ex parte Tompsitt*, 17 V.L.R., 391. *In re Ellison*, 19 V.L.R., 548. *In re Mecredy*, 20 V.L.R., 431.

(*n*) R. 452.

(*o*) Act of 1890, s. 33—compare 32 & 33 Vict. c. 71, s. 77; *vide* also r. 97.

## CHAP. I.

tions by arrangement under s. 153 (2b), Act of 1890, and with the offences committed by creditors, insolvents and other persons under Part XI. of the Act of 1890 (except under sub-s. 3, s. 156), and with the misdemeanour created by s. 25, Act of 1897, for the sharing of the assignee's and trustee's remuneration and the misdemeanour created by s. 55 of the same Act (p).

Punishments  
under the Acts  
cumulative.

Where any person is liable under any other Act of Parliament or at common law to any punishment or penalty for any offence made punishable by the Acts, such person may be proceeded against under such other Act of Parliament, or at common law, or under the Acts, so that he be not punished twice for the same offence (q).

## 6.—AS TO LUNATICS.

R. 271 of the *Bankruptcy Rules* 1886 has been adopted by r. 292 as follows:—"Where any debtor or creditor or insolvent is a "lunatic not so found by inquisition or declared, the Court may "appoint such person as the Court shall think fit to do any act "required by the Acts or Rules to be done by such debtor, creditor "or insolvent." The English section 148 providing that a lunatic found so by inquisition "may act by his committee or *curator bonis*," has not been adopted.

As to the compulsory sequestration of lunatics' estates, *vide* Chapter IV., *post*.

## 7.—LIMITATION OF ACTIONS FOR ANYTHING DONE IN PURSUANCE OF THE ACTS.

Every action brought against any person for anything done in pursuance of the Insolvency Acts must be commenced within six months next after the cause of action has arisen, and if it appears that such action was commenced after the time so limited for bringing the same, the jury must find for the defendant (r).

(p) S. 18, *Supreme Court Act* 1890 ;  
s. 179, *Justices Act* 1890. *Vide* Chapter  
XII., *post*.

(q) S. 163, *Act of* 1890 ; s. 1, *Act of*

1897.

(r) S. 97, *Act of* 1890 ; s. 1, *Act of*  
1897.

## CHAPTER II.

### PRACTICE.

- |   |  |
|---|--|
| <p>1.—<i>The Chief Clerk.</i><br/> 2.—<i>Provisions as to Creditors.</i><br/> 3.—<i>Evidence.</i><br/> 4.—<i>Affidavits.</i><br/> 5.—<i>Proceedings.</i><br/> 6.—<i>Warrants.</i><br/> 7. — (1). <i>Summonses and Motions.</i><br/>           (2). <i>Procedure on Motions under</i><br/>               <i>s. 16, Act of 1890 ; s. 5, Act</i><br/>               <i>of 1897 ; Summonses under</i><br/>               <i>s. 96, Act of 1890 ; and</i><br/>               <i>motions under s. 109, Act</i><br/>               <i>of 1890.</i></p> | <p>8.—<i>Infants.</i><br/> 9.—<i>Payment into Court.</i><br/> 10.—<i>Service and Execution of Process.</i><br/> 11.—<i>Security in Court.</i><br/> 12.—<i>Actions by Trustee and Insolvent's</i><br/>               <i>Partners.</i><br/> 13.—<i>Actions on Joint Contracts.</i><br/> 14.—<i>Amendment.</i><br/> 15.—<i>Judgment.</i><br/> 16.—<i>Execution.</i><br/> 17.—<i>Time.</i><br/> 18.—<i>Costs and Fees.</i><br/> 19.—<i>As to Forms Prescribed.</i></p> |
|---|--|

#### I.—THE CHIEF CLERK.

THE duties of the chief clerk are dealt with in the discussion of the subjects to which his various duties relate. Any chief clerk may act for any other chief clerk in any matter in relation to his office (a). Duties.  
One may act for another.

The chief clerk must submit any matter before him upon which he is doubtful or which the parties or either of them desire should be submitted to the judge for his opinion and order (b). This direction is imperative on the chief clerk, and he is bound to refer a question arising at a meeting of creditors to the judge when required so to do by either party, and for that purpose his duty is to adjourn the meeting (c). May take opinion of Court.

If within one week from the making of an order of sequestration, order on application to approve a composition, order annulling a composition, or order on application for a certificate of discharge, such order has not been completed, it is the duty of the Duty of chief clerk as to preparation and completion of orders.

(a) *Vide* r. 124.  
(b) R. 123.

(c) *In re Reuter*, 4 A.J.R., 143.

**CHAP. II.** chief clerk to prepare and complete such order, provided that if in any case the judge be of opinion that this provision ought not to apply he may so order (*d*).

As to affidavits.

The chief clerk, upon any affidavit being left with him to be filed, must indorse the same with the day of the month and year when the same was so left, and forthwith file the same with the proceedings to which the same relates, and any affidavit left with the chief clerk to be filed must on no account be delivered out to any person except by order of the Court (*e*).

As to filing  
*Gazette* and  
newspapers.

As to filing *Gazette* and newspapers containing advertisements relating to any application, matter or proceeding, *vide* rr. 136 and 137.

Meaning of  
"chief clerk."

As to the meaning of "chief clerk," *vide* s. 4, Act of 1890, and r. 3, "Interpretation of Terms."

## 2.—PROVISIONS AS TO CREDITORS.

Meaning of  
creditor..

The term "creditor" includes a corporation and a firm of creditors in partnership (*f*).

Agent of  
creditor may act  
for creditor.

The duly authorised agent of any creditor, whether a corporation or not, has authority to do all acts, matters and things authorised or required to be done by any creditor under or by virtue of the Acts as fully and effectually as such creditor could or might do (*g*). It has been held under 18 Vict. No. 273, s. 124, that the creditor may be represented by an agent in all matters relating to the estate, and that it would deprive the provision of all beneficial operation if he were held unable to perform a preliminary necessary to set the Court in motion (*h*), and the agent can, therefore, in a proof of debt value the security held by insolvent (*i*); but the authority of the agent must be proved (*k*). In voting at a meeting of creditors the sworn statement of the agent in the proof of debt is sufficient without production of the

(*d*) R. 138—compare r. 5, *Bankruptcy Rules* 1890.

(*e*) R. 135—compare r. 35, *Bankruptcy Rules* 1836.

(*f*) R. 3.

(*g*) S. 21, Act of 1890 (compare 32 & 33 Vict., c. 71, s. 80, sub-ss. 7 and 8, and 28 Vict. No. 273, s. 124, and 10 Vict. No. 14, s. 6; the latter enact-

ments related to creditors residing without the jurisdiction of the Supreme Court); s. 1, Act of 1897.

(*h*) *In re Phelan*, 3 W.W. & A'B. (L.), 4.

(*i*) *In re Evans*, 6 A.L.T., 249.

(*k*) *Ibid*, and *In re Jenkins*, 15 V.L.R., 271. *Vide Re Penglase*, 15 V.L.R., at p. 440.



authority (*l*). As to proceedings by companies or co-partnerships authorised to sue and be sued in the name of a public officer or agent, *vide* r. 284, *post*. CHAP. II.

Any two or more persons being partners, or any person carrying on business under a partnership name, may take proceedings, or be proceeded against, under the Insolvency Acts in the name of the firm, but in such cases the Supreme Court or the Court may on application by any person interested, order the names of the persons who are partners in such firm, or the name of such person, to be disclosed in such manner and verified on oath or otherwise as the Court may direct (*m*). Proceedings in partnership name.

Any petition for sequestration of the estate of any debtor to a firm signed with the name or style of such firm by any partner thereof is duly signed for the purpose of any such petition, and any acceptance of any offer of composition or security for composition, or any release and any authority to vote or to do any act, matter or thing under the Acts, is deemed duly signed if signed with the name or style of the firm by any partner thereof, and any proof of debt may be made by one partner on behalf of the others (*n*), and where any notice, declaration, petition or other document requiring attestation is signed by a firm of creditors in the firm's name the partner signing for the firm must add also his own signature (*o*). Signature by firm for purposes of the Acts.

### 3.—EVIDENCE.

In all suits or actions, and in all informations under the Acts where it is necessary to allege or prove that any party became or was insolvent, or that his estate was sequestrated or adjudged to be sequestrated, it is sufficient merely to allege that such party, being insolvent within the meaning of the Acts, his estate was sequestrated, without setting forth any order for sequestration, or setting forth or proving any petition or any petitioning creditor's debt or act of insolvency, and proof of such allegation may be made by the production of an office copy of the order of Proof of insolvency in any action or other proceeding.

(*l*) *In re Evans, ante*.

(*m*) S. 13, Act of 1897—compare *Bankruptcy Act* 1883, s. 115. *Vide Registration of Firms Act* 1892.

(*n*) S. 22, Act of 1890; s. 1, Act of 1897. The decisions as to compulsory

sequestrations and proofs of debt in connection with this provision are dealt with in Chapters IV. and V. (Division 3) under "Partners."

(*o*) *Vide* r. 285—compare r. 259, *Bankruptcy Rules* 1886.

**CHAP. II.** sequestration or adjudication of sequestration, and (on proof of the identity of the party therein named) such proof is sufficient for the purposes of such allegation (*p*). But as all petitions when presented to a chief clerk must be presented to the chief clerk of the Court of the district in which the petitioner resides, it may be shown in answer to such attempted proof that the order is bad if signed by the clerk of a wrong district (*q*).

The Supreme Court will not take judicial notice of the insolvency of a defendant (*r*).

Proof of election  
appointment  
and confirma-  
tion of trustee.

The order confirming the election or appointment of a trustee, or a copy thereof, signed by a judge or chief clerk, and certified by such judge or chief clerk to be a copy thereof, is directed to be received and taken by all Courts of Justice in Victoria as conclusive evidence that such trustee has been duly elected or appointed and confirmed (*s*); but it is not proof of sequestration or of facts of which an order of sequestration is evidence (*t*).

Proof of  
advertisement.

A memorandum by the chief clerk referring to and giving the date of an advertisement in the *Gazette* or a local paper is by r. 456 *prima facie* evidence that the advertisement to which it refers was duly inserted in the issue of the *Gazette* or paper mentioned in it. The form of memorandum is form No. 122, schedule of forms, *post*.

Minutes of  
meetings.

The minutes of general meetings of creditors, upon proof of the signature of the person presiding at such, are *prima facie* evidence in all Courts of justice of what passed thereat (*u*).

Judicial notice  
taken as to  
signature of  
judge or chief  
clerk and of the  
seal of the  
Court.

All Courts, judges, justices and persons acting judicially take judicial notice of the signature of any judge or chief clerk appointed under the Acts, and of the seal of the Court subscribed or attached to any judicial or official proceeding or document to be made or signed under the Acts (*v*).

(*p*) S. 25, Act of 1890 (compare 5 Vict. No. 17, s. 107; 28 Vict. No. 273, s. 128; and 32 & 33 Vict. c. 71, s. 10); s. 1, Act of 1897.

(*q*) *Reg. v. Poole*, 3 V.R. (L.), p. 184.

(*r*) *McCarthy v. Ryan*, 7 V.L.R. (E.), 136.

(*s*) S. 61, Act of 1890.

(*t*) *Reg. v. Prendergast*, 4 A.J.R.,

79.

(*u*) S. 67, sub-a. x., Act of 1890. As to mode of taking minutes of resolutions, &c., *vide* Chapter V., "Meetings of Creditors."

(*v*) S. 28, Act of 1890 (compare 32 & 33 Vict., c. 71, s. 109); s. 1, Act of 1897. *Vide also Evidence Act 1890*, s. 72.

The Court may in all matters within its jurisdiction take the whole or any part of the evidence either *viva voce*, on oath, or by interrogatories in writing, or upon affidavits, or by commission, and the evidence of persons examined before the Court is reduced to writing by the judge (*w*). This provision, it has been decided, does not render inadmissible written admissions or statements which have been used in other proceedings, as the examination of one of the creditors in the insolvency proceedings (*x*). By r. 6, *post*, witnesses may be ordered out of Court.

CHAP. II.

How evidence to be taken.

Evidence in examinations is dealt with in Chapter VII., *post*.

The minutes of general meetings of creditors, upon proof of the signature of the person presiding at such meeting, are *prima facie* evidence in all courts of justice of what passed at such meeting (*y*).

Minutes of meetings.

Commissions to take evidence under the Acts are issued under the hand of a judge and the seal of the Court, and are, if the witness reside in Victoria, directed to a chief clerk of the Court, and if the witness reside out of Victoria, to such person as the Court may think fit (*z*). An order for a commission and the writ of commission follow the forms for the time being in use in the Supreme Court, with such variations as circumstances may require (*a*).

Formalities as to commissions to take evidence.

Order for and form of commission.

The Court may, in the terms of rule 78, *post*, make an order for the examination upon oath before the Court or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such matter to give such deposition in evidence therein. Under this rule the Court may order an examination to be held at the witness's house before an officer of the Court, when, through illness, the witness cannot attend Court (*b*).

Taking of depositions.

The provisions as to shorthand notes and writers are contained in rr. 79 and 80, *post*.

Shorthand notes and writers.

A subpoena for the attendance of a witness concerning any

Subpoena and service in matters in the Court.

(*w*) S. 18, Act of 1890.

(*x*) *Re Maley*, 4 A.J.R., 7.

(*y*) S. 67, sub-s. x., Act of 1890. As to mode of taking minutes of resolutions, &c., *vide* Chapter V., "Meetings of Creditors."

(*z*) S. 29, Act of 1890; s. 1, Act of 1897.

(*a*) R. 81.

(*b*) *In re Bradbrook, ex parte Hawkins*, 23 Q.B.D., 226.

**CHAP. II.** matter in the Court may be issued by the Court at the instance of the official accountant, a trustee, a creditor, a debtor, or any applicant or respondent in any matter *duces tecum* or otherwise (c). A subpoena may be issued in blank as in the Supreme Court (d).

**Summonses to witnesses.** Summonses in the nature of subpoenas for witnesses may at any time be issued by the chief clerk without the order of a judge with the same force and effect as if issued under such order (e).  
**Service of subpoena.** A sealed copy of the subpoena must be served personally on the witness by the person at whose instance the same is issued, or by his solicitor or agent, or by some person in their employ, within a reasonable time before the time of the return thereof (f).  
**Evidence of service.** Service of the subpoena may, where required, be proved by affidavit (g). The jurisdiction to issue a subpoena does not extend to non-contentious proceedings (h). For present form of subpoena, see form 119, *post*.  
**Form of subpoena: In compulsory sequestrations.** In compulsory sequestrations summonses to witnesses are issued by the associate of the judge, to whom the application is made for an order *nisi* or an order absolute (i).

**Admissions.** As to admissions of documents and facts and notices as to same, *vide* r. 86, *post*; and as to the power of the Court to order production of documents, *vide* r. 82, *post*.  
**Production of documents.**

**Lien ineffective as against trustee.** Where the trustee as such is party to a proceeding he occupies a different position to that which the insolvent does so far as the production of documents are concerned by witnesses summoned or subpoenaed, inasmuch as a lien of a solicitor effectual against the insolvent is ineffectual against him (k).

**Disobedience of subpoena or order.** Any person wilfully disobeying any subpoena or document requiring his attendance for the purpose of being examined or producing any document is deemed guilty of contempt of Court, and may be dealt with accordingly (l). Imprisonment ordered under this provision being a means for enforcing the order of the Court, would determine as soon as obedience is yielded, and the

(c) *Vide* r. 73.  
 (d) *Ibid*.  
 (e) S. 30, Act of 1890.  
 (f) R. 74.  
 (g) R. 75.  
 (h) *In re Ellison*, 19 V.L.R., 548; decided under Act and Rules of 1890.

(i) *Supreme Court Rules* 1884 (5), *post*.  
 (k) *In re McKay and Bell*, 3 A.J.R., 98. *Vide Re Toleman, ex parte Bramble*, 13 C.D., 885.  
 (l) R. 83.

costs are paid, the contempt in this case being of a civil and not of a criminal kind (m). CHAP. II.

As to conduct money and costs of witnesses, *vide post*, "Costs and Fees." Conduct money and costs of witnesses.

As to discovery and interrogatories, *vide r. 85, post*. Discovery and interrogatories.

#### 4.—AFFIDAVITS.

Any affidavit or declaration required to be sworn or made in relation to any matter under the Acts may be lawfully sworn :—

(1.) In Victoria before any commissioner of the Supreme Court for taking affidavits. How sworn.  
In Victoria.

(2.) In any other place under the dominion of Her Majesty before any Court, judge or person lawfully authorised to take affidavits. In any other British place.

(3.) In any foreign parts out of her Majesty's dominions before a magistrate, the oath being attested by a notary, or before a British consul or vice-consul. In foreign parts.

(4.) Any affidavit of any prisoner in any prison or gaol in Victoria to be used in any matter under the Acts may be sworn before a commissioner of the Supreme Court for taking affidavits, or before the keeper of such prison or gaol, and every such keeper is required and authorised to administer the oath upon any such affidavit without fee or reward. All Courts, judges, justices, commissioners and persons acting judicially, take judicial notice of the seal or signature (as the case may be), of any such Court, judge, magistrate, commissioner, keeper or other person attached, appended or subscribed to any such affidavit (n). Judicial notice of signature.

Section 6 of the *Declarations and Affidavits Act* 1890 enacts that all affidavits to be used for any purpose whatever (except in any proceeding in the Supreme Court), may be sworn before a commissioner for taking declarations and affidavits appointed under such Act, and he is thereby authorised to take and receive the same. Declarations and Affidavits Act 1890.

Subject to the provisions of the Acts the trustee for the purpose of receiving and deciding upon proof of debts has power to administer oaths (o). Power of trustee to administer oaths.

No affidavit is sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used or before Disqualification.

(m) *Re Armstrong, ex parte Lindsay*, 8 Mor. 271. r. 72.  
(n) Sec. 27, Act of 1890. *Vide also* (o) S. 85, sub-s. 1.

**CHAP. II.** any clerk, partner or agent of such solicitor, or before the party himself (*p*).

Rules as to affidavits.

The rules relating to affidavits are 61 to 72 inclusive, and those as to filing, rr. 71 and 135, *post*.

### 5.—PROCEEDINGS.

Proceedings :  
How instituted.

Every proceeding in Court under the Acts must be dated and intituled "The Insolvency Acts: In the Court of Insolvency," with the name of the district in which it is taken and of the matter to which it relates. Numbers and dates may be denoted by figures (*g*), and all proceedings in Court must be either in print or manuscript or typewritten, or partly in one and partly in another, as likewise all notices required by the Acts and Rules, unless the Court in any particular case otherwise orders (*r*). Such rules as these are directory merely (*s*).

Printing, &c., of  
same.

Sealing of  
proceedings.

All summonses, notices, orders, warrants and other process issued by the Court must be sealed (*t*).

Office copies.

As to office copies *vide* r. 13, *post*.

Filing *Gazette*  
and newspapers.

Whenever any *Gazette* or other newspaper contains any advertisement relating to any application, matter or proceeding under the Acts or Rules, one copy of such must be left with the chief clerk by the person inserting the advertisement (*u*).

Proceedings by  
company or  
co-partnership.

*Vide* r. 284, *post*.

Proceedings by  
or against firm.

*Vide* rr. 285 to 288 inclusive, *post*.

Defacement of  
stamps.

As to officer's duty as to the defacement of stamps, *see* r. 457, *post*.

All proceedings  
to be of record.

All proceedings of the Court remain on record in the Court so as to form a complete record of each matter, and they cannot be removed for any purpose except for the use of the officers of the Court or by special direction of a judge of the Supreme Court or the Court, but they may at all reasonable times be inspected by

Open to public  
inspection.

(*p*) R. 70.

(*q*) R. 9.

(*r*) Rr. 10 and 11.

(*s*) *Vide In re Cutler and Lever*, 1

V.R. (I.), 13.

(*t*) R. 12.

(*u*) R. 14.

any person on payment of the prescribed fee (*v*). It is a fundamental rule that everything that has been done in the sequestration must be placed upon the file, so that the Court which has ultimately to determine the matter should at all events know how and on what grounds everything has been done (*w*). Depositions of a witness are proceedings and remain on record (*w*).

#### 6.—WARRANTS.

Applications for warrants of the Court under the Acts may be heard and disposed of by a judge sitting in Chambers (*x*), except applications for the committal of any person to prison (*y*). Application for warrants.

All warrants must be under the seal of the Court and signed or certified by a chief clerk (*z*)—that is, a chief clerk of the Court of the district in which the proceedings are being prosecuted (*a*). Sealing and signing.

Every warrant of the Court to do any act or to take or keep any person in custody, if in the form prescribed by the rules, is deemed and taken to be good, valid, and sufficient in law (*b*). Warrants of the Court.

Warrants are addressed to a messenger of the Court or to such officer of the Court or to such other person as the Court may in each case direct (*c*). To whom addressed.

The assignee or trustee may by his messenger, authorised by warrant under his hand, seize and lay an attachment on the insolvent estate and make an inventory thereof (*d*). The messenger making such attachment must leave with the person in whose possession any such property is attached a copy of the warrant under the seal of the Court, together with a copy of the inventory, to which is subjoined a notice that the property of the insolvent has been attached by the messenger, and “that any person who Warrants of attachment by assignee or trustee.

(*v*) S. 120, Act of 1897—compare r. 12, *Bankruptcy Rules* 1886; r. 60 of 1890, repealed, was to the like effect, and was held not to apply to affidavits used on a debtor's summons. *In re Portch*, 7 V.L.R. (I.), 126.

(*w*) *Vide In re Beall, ex parte Beall* (1894), 2 Q.B., at p. 138. As to the right of inspection, *vide also In re Beall, ante*, and *Re Standard Gold Mining Company* (1895), 2 Ch., 545; and as to witness making copies, *vide*

*Ex parte Pratt, re Hayman*, 21 C.D., 439.

(*x*) S. 30, Act of 1890.

(*y*) S. 3 Act of 1897, r. 6.

(*z*) S. 32 Act 1890, r. 12.

(*a*) S. 4, *ibid.* *Vide in re Steed*, 3 A.J.R., 62; and *In re Dunne*, 2 V.L.R. (I.), 16.

(*b*) S. 31, Act of 1890.

(*c*) R. 97.

(*d*) S. 65, Act of 1890.

**CHAP. II.** "knowing the same to have been so attached shall dispose of, "remove, retain, embezzle, conceal or receive the same, or any part thereof, with intent to defeat the said attachment is liable "on conviction of such offence to be imprisoned, with or without "hard labour, for any period not exceeding three years" (e).

The messenger may secure on the premises, by sealing up any repository, room, or closet, any articles which in the discharge of his duty it seems to him expedient so to secure, or may leave some person on the premises in custody thereof (f).

Form of warrant of attachment.

The form of warrant of attachment is Form No. 135.

Seizure of insolvent's property under warrant of the Court.

Any person acting under warrant of the Court may seize any property of the insolvent divisible amongst his creditors under the Acts in the insolvent's custody or possession, or in that of any other person, and with a view to such seizure may break open any house, building or room of the insolvent where the insolvent is supposed to be, or any building or receptacle of the insolvent where any of his property is supposed to be (g).

Form of warrant of seizure.

The form of warrant of seizure is No. 138.

Search warrants.

Where the Court or judge is satisfied that there is reason to believe that property of the insolvent is concealed in a house or place not belonging to him, the Court or judge may grant a search warrant (h) to any constable or prescribed officer of the Court, who may execute the same according to its tenor (i).

Form of search warrant.

The form of search warrant is No. 137.

Warrants for arrest of insolvent.

The Court may by warrant addressed to any constable or prescribed officer of the Court cause an insolvent to be arrested, and any books, papers, moneys, goods and chattels in his possession to be seized, and him and them to be safely kept until such time as the Court may order under the circumstances set out in s. 129, Act of 1898 (j).

Form of such warrant.

The form of such warrant is No. 136.

(e) S. 65, Act of 1890. The punishment for the offence referred to as to persons other than the insolvent would seem to be six months imprisonment; vide s. 156 (3), Act of 1890.  
(f) *ibid.*

(g) S. 66, *ibid.*  
(h) Form 137.  
(i) S. 66, Act of 1890.  
(j) S. 129. *Vide* Chapter VI., "Arrest of Insolvent."



As to the custody and production of debtors and the custody of books, papers, &c., *vide* r. 98, *post*. CHAP. II.

The Court may by warrant cause a person to be apprehended and brought up for examination under the circumstances set out in s. 135, Act of 1890 (*k*). The form of such warrant is 140. Form of warrant 136 also deals with an insolvent failing without good cause to attend the Court for the purpose of being examined "according to the requirements of the Insolvency Acts directing "him so to attend."

Custody and production of debtors and papers.

Warrants as to examination under the Act.

The form of warrant of committal for prevarication is form 141 (*l*).

Warrant of committal for prevarication and form.

The form of warrant of committal for contempt is form No. 139 (as to contempt, *vide* Chapter I. hereof, at p. 26). Form 136 also deals with contempt and prevarication at an examination.

Warrant of committal for contempt and form.

The form of warrant under s. 149, Act of 1890 compelling the insolvent to appear on a compulsory certificate application (*m*) is form No. 73. The form under s. 148 to hold insolvent to bail to come up for judgment on an opposed certificate application is form No. 142, and the warrant under ss. 140 and 141 upon order refusing certificate and sentencing to imprisonment is form No. 74.

Warrants relating to the certificate, (*a*) under s. 149, (*b*) under s. 148, (*c*) under ss. 140 and 141.

Any warrant of a Court having jurisdiction in bankruptcy in England may be enforced elsewhere in Her Majesty's dominions. As to this, *vide* s. 119, *Bankruptcy Act* 1883; Victorian Statutes 1890, vol. 7, p. 555.

Enforcement of warrants of the English Bankruptcy Court.

## 7.—(1) SUMMONSES AND MOTIONS.

### (2) PROCEDURE ON MOTIONS UNDER S. 16, ACT OF 1890; S. 5, ACT OF 1897; SUMMONSES UNDER S. 96, ACT OF 1890, AND MOTIONS UNDER S. 190 OF ACT OF 1890.

#### 1.—*Summonses and Motions.*

Applications for summonses may be heard and disposed of by a judge sitting in Chambers (*n*), and any summons issued under the provisions of the Acts may be returnable at such place to be

Applications for summonses.

Where returnable.

(*k*) *Vide* Chapter VII. hereof.  
(*l*) *Vide* s. 135, Act of 1890.

(*m*) *Vide* Chapter VIII.  
(*n*) S. 30, Act of 1890.

**CHAP. II.** named in such summons as a judge may determine in whatever district such place may be (*o*). Summonses in the nature of subpoenas for witnesses may at any time be issued by the chief clerk without the order of a judge, and have the same force and effect as if issued under such order (*p*). All summonses must be under the seal of the Court and signed or certified by a chief clerk (*q*).

Summonses in the nature of subpoenas.

Sealing, signing, and certifying of summonses.

Motions and practice thereon.

Motions generally and the practice thereon are dealt with in rr. 19 to 32a, *post*, and the following matters are there treated :—

Applications by motion not otherwise provided by the rules.  
Notice of motion and *ex parte* proceedings.  
Length of notice.  
Affidavits stated in notice served therewith.  
Application to serve short notice.  
Service of affidavit in reply.  
Affidavits against motion.  
Notice for cross-examination of deponent.

Expenses of deponent.  
Notice not served on proper parties.  
Adjournment.  
Personal service.  
Filing affidavits.  
Filing of notice of motion.  
Precedence of motions.  
Carriage of order.  
Notice of appointment to settle order.  
Applications in Chambers, and how made.  
Service of affidavits thereon.

(2) *Procedure on Motions under s. 16, Act of 1890 ; s. 5, Act of 1897 ; and on Summonses under s. 96, Act of 1890 (r), and Motions under s. 109, Act of 1890 (s).*

The rules dealing with these subjects of practice are those numbered 33 to 47 inclusive, *post*, the following matters being dealt with in same :—

Motions under the sections referred to.  
Contents of notice of motion and summons under s. 96.  
Indorsement on notice.  
Service of notice and summons.  
Notice of defence.  
Parties to be deemed plaintiff and defendant.  
Amendment.  
Order for particulars.  
Hearing upon *viva voce* evidence or by

consent upon affidavit.  
Affirmative to be on plaintiff.  
Evidence where notice based on more than one ground.  
Nonsuit.  
How applicant to open.  
*Rules of the Supreme Court* with reference to trials to apply.  
Affidavit in support of motion as to proof of debt.

(*o*) S. 15, Act of 1897 — compare *County Court Act 1890, s. 106.*

(*p*) S. 30, Act of 1890.

(*q*) S. 32, Act of 1890.

(*r*) As to the jurisdiction conferred by

the sections referred to, *vide* Chapter I., "Jurisdiction."

(*s*) As to proofs of debt generally, *vide* Chapter V., Div. 3.

Every notice of motion may be in form No. 117 in appendix, **CHAP. II.**  
*post*; summonses under s. 96, Act of 1890, form No. 116; and the notice of defence, form No. 118 (*t*).  
Form of motion.  
 Summons and  
 notice of  
 defence.

8.—INFANTS.

When any infant is the claimant or plaintiff in any application to the Court under the Acts, the same must be made by a next friend of such infant, and the consent of such next friend to act as such must be filed before any such application is heard, and every next friend is liable to costs as if he were a next friend in an action in the Supreme Court (*u*). The Court may appoint a guardian *ad litem* to any infant being a party defendant to any application to the Court, and such appointment may be made on the application of the infant or of the claimant or plaintiff, but in the latter case upon four days' notice to the persons in whose custody or care the infant may be, and such guardian must perform the same duties and be liable in the same way and to the same extent, as nearly as may be, as a guardian *ad litem* in an action in the Supreme Court (*v*).  
Applications  
 by and against.

As to voluntary and compulsory sequestrations in regard to infants, *vide* Chapters III. and IV. respectively.  
As to voluntary  
 and compulsory  
 sequestrations.

9.—PAYMENT INTO COURT.

The rules as to payment into Court are 50 and 51, *post*, and are based on rr. 43 and 44 of 1890, repealed.

10.—SERVICE AND EXECUTION OF PROCESS.

Every solicitor suing out or serving any petition, notice, summons, order, writ of execution, or other document, must endorse thereon his name or firm, and place of business, which is called his address for service—all notices, orders, documents, and other written communications, which do not require personal service, are deemed to be sufficiently served on such solicitor if left for him at his address for service (*w*). Service of notices, summonses, orders, or other documents and proceedings, must, in  
Address for  
 service.  
 Service of  
 notices  
 generally.

(*t*) R. 39.  
 (*u*) R. 48.

(*v*) R. 49.  
 (*w*) R. 104.

**CHAP. II.** cases other than that of personal service, be effected before the hour of five of the clock in the afternoon, except on Saturdays, when it must be effected before the hour of one in the afternoon (x). Such service effected after five in the afternoon on any week day except Saturday, for the purpose of computing any period of time subsequent to such service, is deemed to have been effected on the following day. Such service effected after one in the afternoon on Saturday for the like purpose is deemed to have been effected on the following Monday (y). All notices and other documents for the service of which no special mode is directed may be sent by prepaid post letter to the last known address of the person to be served therewith (z). Where notice or other document or proceeding may be served by post it must be sent by registered letter (a). Every insolvent must, until he obtains his certificate, keep his assignee or trustee informed of his true place of residence and business, and any order, summons, notice, or other proceeding, unless by the Acts or the rules otherwise provided (b), posted by prepaid registered letter to or delivered at the address given by him, shall be deemed served upon the insolvent (c).

On insolvent.

On firm.

Any notice, petition, or debtor's summons for which personal service is necessary is deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm in Victoria, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there (d). Under r. 260 of the *Bankruptcy Rules* 1886, from which the rule cited is taken, it has been held that a petition against a firm cannot be served upon a receiver or manager of the partnership business appointed by the Court with the consent of all the partners, since such a receiver is the officer and servant of the Court and not of the partners (e).

Enforcement of orders.

By r. 108, *post*, every order of the Court may be enforced as if it were a judgment to the same effect.

(x) R. 105.

(y) R. 106.

(z) S. 125, Act of 1897.

(a) R. 107.

(b) R. 109.

(c) *Vide* also Chapter VI.

(d) R. 286.

(e) *Re Flowers, ex parte Ware*, (1897) 1 Q.B., 14; 3 Manson, 294; *vide*, also *Burt v. Bull*, (1895) 1 Q.B., 265; *Owen v. Cronk*, 2 Manson, 115.

## 11.—SECURITY IN COURT.

## CHAP. II.

The rules as to security in Court are those numbered 52 to 60, *post*.

## 12.—ACTIONS BY TRUSTEE AND INSOLVENT'S PARTNERS.

Where the estate of a member of a partnership is sequestrated, the Court may authorise the trustee to commence and prosecute any action in the names of the trustee and of the insolvent's partner, and any release by such partner of the debt or demand to which the action relates is void (*f*). Notice of the application for authority to commence the action must be given to such partner, and he may show cause against it, and on his application the Court may, if it thinks fit, direct that he receive his proper share of the proceeds of the action, and if he does not claim any benefit therefrom he must be indemnified against costs in respect thereof as the Court directs (*g*). It was stated in a decision under a similar section in 6 Geo. IV. c. 16, s. 89, that a release of the cause of action given by an absent partner before notice of the order would be good (*h*). S. 90, Act of 1890, is almost the same as s. 11, Act of 1897. The former, however, refers to actions and proceedings against "any debtor of the partnership," the latter to "any action."

## 13.—ACTIONS ON JOINT CONTRACTS.

Where an insolvent is a contractor in respect of any contract jointly with any person or persons such person or persons may sue or be sued in respect of the contract without a joinder of the insolvent (*i*). "Person" includes a corporation, unless there be something repugnant to or inconsistent with that interpretation (*j*).

## 14.—AMENDMENT.

Provisions as to amendment are contained in both Acts. As Amendment under the Act of 1890. to those under the Act of 1890, no petition, order, summons, warrant, commission or other proceeding or document of, or to be

(*f*) S. 11, Act of 1897—compare *Bankruptcy Act* 1883, s. 113; and *Bankruptcy Act* 1869, s. 12.

(*g*) *Ibid*.

(*h*) *Ex parte Wilson, re Bryant*, 3

Mont. & Ay., at p. 221.

(*i*) S. 12, Act of 1897—compare *Bankruptcy Act* 1883, s. 114.

(*j*) *Acts Interpretation Act* 1890, s. 5.

## CHAP. II.

Want of form or omission not to invalidate proceedings.

used by or before the Supreme Court or Court of Insolvency or a judge thereof, is invalidated by reason of any want of form or omission therein unless the Court or judge is of opinion that substantial injustice has been caused by such want of form or omission, and that such injustice cannot be remedied by order of the Court or judge, and every warrant of the Court to do any act or to take or keep any person in custody, if in the form prescribed by the rules, is deemed and taken to be good, valid and sufficient at law (*k*).

(*k*) S. 31, Act of 1890—compare 32 & 33 Vict. c. 71, s. 82, and the *Bankruptcy Act* 1883, s. 143. This provision has been judicially interpreted from various points of view. Holroyd, J., says (*In re Penglase*, 15 V.L.R., 439):—“In *Cooper's Case*, 2 V.L.R. (I.), 82, ‘Molesworth, J., seems to have thought that he could, as to matters of substance, have supplied omissions in the order nisi on cause being shown against it if there had been a petition properly presented. See also *Re Reade*, 2 V.L.R. (I.), p. 84. The petition here, if I might amend by a petition not recited, undoubtedly alleges a debt of the requisite amount incurred within the prescribed time. My own impression is, and I should so decide if necessary, that the omissions, which can be supplied under s. 31, are omissions of words accidentally dropped out of a paragraph, and not of statements essential to show jurisdiction.” In construing it, Hood, J. (*In re Field*, 16 A.L.T., 163; 21 V.L.R., 278, says:—“It will be noticed that there is here no direct power of amendment at all, but the section is in form prohibitive. It deals with two cases, ‘want of form’ and ‘omission,’ and its effect is to prevent the success of objections in either of those cases unless a substantial irremediable injustice has been done. The ‘want of form’ and ‘omission’ do not seem to me to be two names for the same thing. The former expression would cover in formalities and every slip merely technical. An omission, therefore, must be something different, and the only way that I can read it is to make it include matters of substance. But, assuming that the section does cover the omission of matters of substance, the question arises will it apply to the omission of matters of substance essential to show jurisdiction? I can find no case where an order nisi which did not show a complete act of insolvency has been

‘upheld, and there is the distinct opinion of Holroyd, J. (*In re Penglase*, 15 V.L.R., 440), against the validity of such a document. On the other hand the Full Court, *In re Hall*, 13 V.L.R., 233, and Molesworth, J., *In re Cooper*, 2 V.L.R. (L.), 32, appear to me to have been of a contrary opinion. I think I ought to follow the opinion of the Full Court, but apart from that, from a consideration of the negative form of the section, and from the reference to substantial injustice, I have come to the conclusion that it was intended that no document should be invalid by reason of any omission, no matter what that omission might be, provided that the respondent could be protected from any possible injustice.” But in *In re Levinson*, 21 V.L.R., 153, at p. 154; 17 A.L.T., 101; 1 A.L.R., 72, Madden, C.J., says:—“*In re Field* goes too far,” and in the judgment adds:—“If it be necessary for me to decide the question whether I have jurisdiction to make an alteration by way of amendment I shall decide it in the negative. By s. 31 of the Insolvency Act nothing of the kind was intended, otherwise the Legislature would be declaring that a person could be made insolvent on any ground raised at the hearing. On the other hand the Legislature prescribes with great rigidity the manner in which a person is to be made insolvent and his estate sequestered. I think, however, that while every attention is given to treat matters of jurisdiction and the substance of the proceedings strictly, small defects formerly fatal, such as errors of inadvertence, may now be cured at the hearing, otherwise the utmost rigidity of interpretation is necessary.” It also appears in this judgment that an amendment may defeat the legal right which the respondent has of taking objection to the proceedings, for it is said that s. 45, Act of 1890, imposes on a respondent

The section quoted resembles the compared sections referred to in note *k*, and on such it has been held that the omission of not duly stating the date of the act of bankruptcy could be amended on the hearing or on appeal (*l*). CHAP. II.  
As to date of act of insolvency.

A matter which goes to the jurisdiction cannot be amended, and an objection to such cannot be waived (*m*). Matters going to the jurisdiction.

Amendment of errors in an order *nisi* can be made after the close of the petitioner's case where the amendment does not prejudice the respondent (*n*). Time of amendment.

The fact that a document is impounded would not be allowed to obstruct an amendment if an amendment was thought necessary by the Court (*o*). Impounded documents.

The Supreme Court has inherent jurisdiction to amend an order drawn up in such a manner as to make it a different order from that which the Court intended to pronounce (*p*). Inherent power of Supreme Court to amend.

In addition to the powers contained in the Act of 1890, the Act of 1897, s. 10 (2), contains a further power of amendment as follows:—"The Supreme Court or the Court may at any time allow upon such terms (if any) as it may think fit to impose, any amendments which in the judgment of the Supreme Court or the Court ought to be allowed in any proceeding, whether there be anything in writing to amend by or not." This section is based upon the *Bankruptcy Act* 1883, s. 105 (3), as follows:—"The Court may at any time amend any written process or proceeding under this Act upon such terms (if any) as it may think fit to impose." Under the latter, amendments of an extensive nature have been made, as for instance the House of Lords Powers of amendment under Act of 1897.

the duty of judging his position—that is to see if he has a really good objection to the proceedings. It entitles him to say whether he will or will not lodge objections. If he lodges objections he thereby waives his right to object to the sufficiency of the order *nisi*. If he does not lodge his objections in regular time he waives all right to rely on any objections to the merits afterwards, and where he has so chosen his course, and thus has no longer any opportunity to alter it, he is not to be met with an amendment by the petitioner, which defeats the course he has, in pursuance of his legal right, chosen.

(*l*) *In re and ex parte Dunhill*, (1894)

2 Q.B., 234; 1 Manson, 242. *Vide* also for other instances *Ex parte and re Johnson*, 25 C.D., 112; *Ex parte Kirkwood, re Mason*, 11 C.D., 724; *Ex parte Coates, re Skelton*, 5 C.D., 979; *Ex parte and re Jerningham*, 9 C.D., 466.

(*m*) *In re Cohen*, 16 A.L.T., 106; but see s. 10 (2), Act of 1897.

(*n*) *In re Vagg*, 13 V.L.R., 172. Costs of the amendment were allowed to the respondent in this case.

(*o*) *Vide In re McGilivray*, 6 V.L.R. (I.), at p. 41.

(*p*) *In re Dionisio*, 14 V.L.R., at p. 340.

CHAP. II. amended a judgment and all subsequent bankruptcy proceedings against a partnership firm in which an infant was a partner by adding the words "other than . . . the infant," the Court of Appeal having previously decided that the proceedings were bad, as the Act and rules do not authorise the making of a receiving order against a partnership firm of which an infant is a partner (*q*). Though there is no limitation fixed of the time within which the amendment may be made, the Court will not amend a petition for the compulsory sequestration of an estate by adding as petitioners, after the statutory period has elapsed from the date of the act of bankruptcy upon which the petition is founded, fresh creditors and also fresh debts (*r*).

#### 15.—JUDGMENT.

Judge may reserve decision.

In any matter in insolvency or proceeding in the Court, the judge may, if he thinks fit, reserve his decision on any question of fact or of law (*s*), and where any judge has so reserved his decision he may give the same at any continuation or adjournment of the Court or at any subsequent holding thereof or he may draw up such decision in writing, and having duly signed the same, forward it to the chief clerk (*t*). Upon receipt of such decision in writing such chief clerk must notify the parties or their respective barristers and solicitors of his intention to proceed at some convenient time by him specified to read the same in the court-house at which such Court is holden, or other convenient place, and must read the same accordingly, and thereupon such decision is of the same force and effect as if given by such judge in open Court at the hearing of the matter or proceeding (*u*).

Judge may forward reserved decision in writing for chief clerk to read.

#### 16.—EXECUTION.

The rules as to writs of execution and testing of same are 102 and 103, *post*.

(*q*) *Lovell v. Beauchamp*, (1894) A.C. 607.

(*r*) *In re and ex parte Maund*, (1895) 1 Q.B., 194. This case is distinguished from those in which persons have been joined as *cestuis que trustent* or trustees. *Ex parte and re Owen*, 13 Q.B.D., 113; *Ex parte Dearle, in re Hastings*, 14 Q.B.D., 184; *Re Ellis, ex parte Hin-*

*shelwood*, 4 Morrell, 283; the joining of such persons being a mere rule of English bankruptcy; *Ex parte Culley, in re Adams*, 9 C.D., 307.

(*s*) S. 16, Act of 1897—compare Act No. 1078, s. 88.

(*t*) *Ibid*.

(*u*) S. 16, Act of 1897.



The forms of præcipe and writs, Nos. 124 to 130, *post*.

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Forms.

### 17.—TIME.

Where by the Acts or rules any limited time from or after any date or event is appointed or allowed for the doing of any act or the taking of any proceedings, or for any other purpose than in the computation of that limited time, the same is taken as exclusive of the day of that date or of the happening of that event, and as commencing at the beginning of the next following day, and the act or proceeding must be done or taken at latest on the last day of that limited time as so computed, unless the last day is a Sunday, Christmas Day, Good Friday, or Monday or Tuesday in Easter week, or a day appointed for public fast, humiliation, or thanksgiving, or a day on which the Court does not sit, in which case any act or proceeding is considered as done or taken in due time if it is done or taken on the next day afterwards, if it is not one of the days specified. Where by the Acts or rules any act or proceeding is directed to be done or taken on a certain day, then if that day happens to be one of the days specified, the act or proceeding is considered as done or taken in due time if it is done or taken on the next day afterwards, if it is not one of the days specified. For the purpose of the rules "a day on which the Court does not sit" means a day on which the offices of the Court are closed (*v*).

Computation of time.

Rule 4 of the Rules of 1890 was held to apply to days prescribed by the rules or the practice of the Court (*w*). The rule of 1898 cited refers also to the Acts, and as the rule did not touch time prescribed under the Acts, Sunday counted within the four days allowed by s. 45 for filing objections to an order *nisi* (*x*), and also in the twelve days under s. 37 (5), providing that a petition for sequestration thereunder must be presented within twelve days from the seizure (*y*). The rule as to computation of time with reference to the interpretation of Acts and private instruments is: Where any number of days not expressed to be

(*r*) R. 4.

(*w*) *In re* ———, 18 V.L.R., at p. 571.

(*x*) *In re Counihan*, 8 V.L.R. (I.), 14.

(*y*) *In re* ———, 18 V.L.R., 571.

*Vide also In re Crisp*, 5 V.L.R. (I.), 1; *In re Counihan*, 8 V.L.R. (I.), 14. The rule of 1898 does not refer to Supreme Court proceedings; r. 1. *Vide also In re Ferjic*, 24 V.L.R., 416.

## CHAP. II.

clear days is prescribed, the same are to be reckoned exclusively of the first day and inclusively of the last day (z).

Fractions of a day.

The Court will not regard fractions of a day unless it is necessary to decide which of two acts done on the same day was done first (a).

Abridgment or enlargement of time.

By s. 10 (3), Act of 1897, it is enacted that where by the Acts or by general rules the time for doing any act or thing is limited, the Supreme Court or the Court (as the case may be) may extend the time either before or after the expiration thereof upon such terms (if any) as such Court may think fit to impose. This is adapted from s. 105 (4) of the *Bankruptcy Act* 1883, and it is said to be of general application, and is not limited to procedure (b). In a case where the trustee was allowed an extension of time to disclaim onerous property, it was held that where a trustee applies for an extension of time he should give some good reason for it, and if the rights of other parties will be prejudiced by the time being extended he will, as a general rule be put on terms (c). Rule 455 also provides that the Court may, under special circumstances, and for good cause shown, abridge the time appointed by the rules or fixed by any order of the Court for doing any act or taking any proceedings (d).

## 18.—COSTS AND FEES.

Jurisdiction as to costs

Subject to the provisions of the Act of 1897 and to general rules, the costs of and incidental to any proceeding under the Insolvency Acts are in the discretion of the Supreme Court or the Court (as the case may be), but where any issue is tried by a jury the costs follow the event, unless upon application made for good cause shown the judge before whom such issue is tried otherwise orders (e), and in awarding costs the Supreme Court or the Court may award the same either out of the insolvent estate or against any person or persons as seems just (f).

Power to award out of estate or against any person.

(z) *Watson v. Issell*, 16 V.L.R., 607; over-ruling *In re Walker*, 15 V.L.R., 684. *Vide* r. 12, Order 64, *Supreme Court Rules* 1884 (Judicature).

(a) *Ex parte Taylor*, 6 A.L.T., at p. 171. See further, as to computation of time, *Lester v. Garland*, 15 Ves., 257; *Webb v. Fairman*, 3 M. & W., 473; *Young v. Higgin*, 6 M. & W. 49; *Reg. v. Justices of Shropshire*, 8 Ad. & El.,

173; *Chambers v. Smith*, *ibid*, 175; *Blunt v. Hislop*, 8 Ad. & El., 577; *In re Railway Sleepers Supply Co.*, 29 C.D., p. 204.

(b) *Vide In re Price, ex parte Foremann*, 13 Q.B.D., at p. 467.

(c) *Ibid*.

(d) *Vide* also rr. 20-23.

(e) S. 10 (1), Act of 1897.

(f) S. 10 (4), *Ibid*.

These provisions will apply generally to and include the cases in which the insolvent, the trustee or assignee, or creditors are engaged as parties in matters in contention between them, and also questions of disputed ownership of property, but it has been held that the Court has no jurisdiction to order a witness summoned before it under an examination summons to pay costs (*g*), and the Supreme Court will restrain it by writ of prohibition from enforcing such an order (*h*). S. 10 (1) of the Act of 1897, is an adaptation of s. 105 (1), of the *Bankruptcy Act* 1883, and of r. 1, Order 65 of the *Rules of the Supreme Court* 1883 (English), and the like rule of the *Rules of the Supreme Court* (Judicature) 1884 (Victoria), the words "at the trial," included in the latter, are omitted in reference to applications for costs after trial of an issue by a jury in order to obviate difficulties and inconvenience. *Vide* also r. 153, *post* as to application for costs. The jurisdiction, therefore, as to costs, is of a discretionary nature, and they do not necessarily follow the result, as a successful plaintiff may be made to pay the defendant's costs, as the discretion is an unlimited one (*i*), as where, in a jury case "good cause" was shown, the plaintiff recovering 6s. in an action brought for two sums of £85 and 6s. (*j*), and as where the action was held unnecessary (*k*). As to whether the judge exercises his discretion rightly, there can be no appeal (*l*), unless, perhaps, it has been exercised in such a way that the Court must say it is absolutely wrong (*m*). Where an issue is tried by a jury, the costs follow the event, and the judge has no discretion as to costs unless "good cause" is shown, and an appeal will lie with respect to the existence of the facts necessary to give the judge jurisdiction to make the order by which the costs will not follow the event (*n*). In order to establish "good cause" within the provision, facts must exist showing that it would be more just not to allow the costs to follow the event, such as misconduct by which the costs have been unnecessarily increased (*o*).

Jurisdiction  
as to costs  
discretionary.

(*g*) Except under the special provisions of s. 111 (4 and 5) of the Act of 1897.

(*h*) *In re Sinclair, ex parte Watson*, 15 V.L.R., 736.

(*i*) *Harris v. Petherick*, 4 Q.B.D., 611.

(*j*) *Ibid.*

(*k*) *Fane v. Fane*, 13 C.D., 228.

(*l*) *Snelling v. Pulling*, 29 C.D., 85.

(*m*) *Vide Jones v. Curling*, 13 Q.B.D., at p. 267.

(*n*) *Ibid.*

(*o*) *Ibid.*, and *vide* also *Cooper v. Whittingham*, 15 C.D., at p. 504.

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Scale of costs  
and regulations.

The scale and regulations as set out in the appendix to the Rules, *post*, apply to all proceedings under the Acts and Rules (*p*), subject to the limitations in r. 1, *post*, and also to the fees under the *Supreme Court Rules* 1884, *post*.

Awarding costs  
and taxation.

The Court in awarding costs may direct that the same be taxed and paid as between party and party, or as between solicitor and client, or the Court may fix a sum to be paid in lieu of taxed costs (*q*); but in the absence of any expressed direction costs of an opposed motion follow the event and are taxed as between party and party (*r*).

The direction referred to can only be given at the time of making the order awarding costs (*s*).

Application for  
costs.

When any party to or person affected by any proceeding desires to make an application for an order that he be allowed his costs or any part of them incident to such proceeding, and such application is not made at the time of the proceeding, such party or person must serve notice of his intended application on the assignee or trustee. The assignee or trustee may appear in such application and object thereto, and no costs of and incident to such application are allowed to the applicant unless the Court is satisfied that the application could not have been made at the time of the proceeding (*t*).

All bills must be  
taxed by chief  
clerk.

Not allowed in  
accounts  
otherwise.

All bills and charges of barristers and solicitors, accountants, auctioneers, brokers and other persons not being trustees, must be taxed by the chief clerk, and no payment in respect thereof can be allowed in the trustee's accounts without proof of such taxation having been made (*u*). The chief clerk must satisfy himself before passing such bills and charges that the employment of such barristers and solicitors, accountants, auctioneers, brokers and other persons in respect of the particular matters out of which such charges arise was reasonable and necessary (*v*). Every person mentioned must, on written request by the trustee (which request the trustee has to make a sufficient time before declaring a dividend), deliver his bill of costs or charges to the chief clerk for

Forfeiture of  
costs in default  
of complying  
with request to  
deliver bill.

(*p*) R. 143.

(*q*) R. 140.

(*r*) *Ibid*.

(*s*) *Ex parte Shoolbred, re Angell*, 14 Q.B.D., 298.

(*t*) R. 153.

(*u*) S. 27 (3), Act of 1897, r. 331.

(*v*) S. 27 (3), Act of 1897—compare *Bankruptcy Act* 1883, s. 73 (3).

taxation, and if he fail to do so within ten days after receipt of the request, or such further time as the Court on application may grant, the trustee must declare and distribute the dividend without regard to any claim by him, and thereupon any such claim is forfeited as well against the trustee personally as against the estate (*w*). The form of request is form 109, Appendix of Forms, Form of request. *post*. The chief clerk taxes subject to revision by the Court (*x*), and an appeal lies to the Court from a decision of the chief clerk in allowing or disallowing any item on the motion of the assignee or trustee or any creditor of the estate or any person interested (*y*). Appeal from chief clerk's taxation.

The costs ordered to be taxed are taxed on the production of the office copy of the order, if any, and the order for payment of money or costs or either of them must be sealed and signed by the chief clerk, and filed forthwith with the proceedings (*z*). Though the evidence upon which the order is made be recited in it the taxing officer it has been held is not precluded from disallowing the costs of such evidence (*a*). Order to tax.

The bill of costs must be filed on completion of the taxation (*b*). Filing of bill.

The allocatur when stamped is signed and dated by the chief clerk taxing the costs (*c*), and issues on the filing of the bill (*d*). The forms of allocatur are Nos. 110 and 111, *post*. When a bill is taxed under any special order and it appears that costs are to be paid otherwise than out of the estate, the taxing officer must specially note upon the allocatur by whom or the manner in which such costs are to be paid (*e*). The allocatur. Forms of allocatur. Costs on special order.

Before taxing, the taxing officer requires a certificate in writing signed by the assignee or trustee as the case may be to be produced to him setting forth whether any, and if so what special terms of remuneration have been agreed to (*f*). Certification before taxing.

Not less than three days' notice of the appointment to tax must be given by the party to the assignee or trustee (*g*). Notice of appointment.

By r. 150, every person whose bill or charges is or are to be taxed must, on application of the official accountant, or the assignee or

(*w*) S. 27 (4), Act of 1897—compare *Bankruptcy Act* 1883, s. 73 (4).

(*x*) R. 143.

(*y*) S. 27 (6), Act of 1897.

(*z*) Rr. 141, 142.

(*a*) *Re Abraham, ex parte Trustee*, 2 *Manson*, 369.

(*b*) R. 145.

(*c*) R. 142.

(*d*) R. 145.

(*e*) R. 145.

(*f*) R. 147.

(*g*) R. 149.

CHAP. II.	trustee furnish a copy of his bill or charges so to be taxed on payment of sixpence per folio which payment may be charged to the estate.
Intervention of official accountant.	The official accountant can call the attention of the chief clerk to any items which in his opinion ought to be disallowed or reduced ( <i>h</i> ).
Costs of taxation.	By s. 27 (3), Act of 1897, the chief clerk is directed not to allow any costs for preparing or taxing the bills and charges of barristers and solicitors, accountants, auctioneers, brokers and other persons not being trustees; and by r. 152 if the bill of costs of any solicitor in the matter of a petition presented under Parts III. or IV. of the Act of 1890 or of any solicitor employed by an assignee or trustee when taxed be less by a sixth part than the bill delivered, then such solicitor or his legal representative must pay the costs of taxation.
General regulations as to costs, taxation and review.	The appendix to the forms, Part 2 (7), <i>post</i> , contains general regulations (under such heading) referring to costs, the taxation of same, and review of taxation.
Register of bills taxed and return.	Every chief clerk must keep a register of the bills taxed and make the return to the official accountant, as set out in r. 146, <i>post</i> .
Reference to Prothonotary or Taxing officer of any other court.	The Court may refer for taxation any bill of costs or charges to the Prothonotary or a taxing officer of the Supreme or any other Court, and in respect of such costs or charges the decision of the Prothonotary or taxing officer is deemed to be the decision of the chief clerk, and is subject to appeal to the Court ( <i>i</i> ).
Appeal therefrom.	
Attendance of trustee at taxation.	The trustee, if required by the chief clerk or other taxing officer, must, either personally or by his attorney, attend before the chief clerk or other taxing officer on the taxation of all costs relating to the estates of which he is trustee ( <i>k</i> ).
Supreme Court fees in the insolvency jurisdiction.	The fees payable to solicitors for proceedings before the Supreme Court, or a judge thereof, in the insolvency jurisdiction are the same as allowed by the higher scale, under the <i>Common Law Procedure Statute 1865</i> ( <i>l</i> ).

(*h*) R. 151.

(*i*) S. 27 (5), Act of 1897.

(*k*) R. 143.

(*l*) *Vide* r. 8, *Supreme Court Rules*

1871 ; r. 14, *Supreme Court Rules 1884*, *post*. The Appendix, Part 2 (2), to the Rules, *post*, contains a scale of items headed "Petitioning Creditors' Solici-

The fees payable to the Crown for proceedings before the Supreme Court, or a judge thereof, in the insolvency jurisdiction, are those contained in the second schedule of the *Supreme Court Rules* 1884 (m). These fees relate to compulsory sequestrations, and the costs of the proceedings are taxed by a taxing officer of the Supreme Court (n). CHAP. II.  
Taxation of  
same.

R. 154 provides that, subject to any order of the Court the assets in every matter remaining after payment of the actual expenses incurred in realizing any of the assets of the debtor are liable to the following payments in the following order of priority:— Priority of costs  
and charges  
payable out of  
estate.

First.—The taxed costs of sequestration, under Parts III. or IV. of the principal Act.

Next.—The actual expenses incurred by the assignee in protecting the property or assets of the insolvent, or any part thereof, and any expenses or outlay incurred by him, or by his authority, in carrying on the business of the insolvent and allowed by the Court.

„ The percentage payable under s. 118 of the *Insolvency Act* 1897.

„ The remuneration of the assignee.

„ The taxed charges of any shorthand writer appointed by the Court.

„ The trustee's necessary disbursements, other than actual expenses of realization heretofore provided for.

„ The costs of any person properly employed by the trustee.

„ Any allowance made to the debtor by the trustee, under s. 120 of the principal Act.

„ The remuneration of the trustee.

„ The actual out of pocket expenses necessarily incurred by the committee of inspection.

As to priority of payment, *vide* also s. 123, Act of 1890.

tors' Bill of Costs." This scale may be valid from the instructions up to the granting of an order *nisi* by a judge of the Court of Insolvency, but otherwise the schedule, regarding s. 12, Act of 1890, appears to be *ultra vires*. *Vide* also r. 1, *post*, which excepts proceed-

ings in matters in which jurisdiction is given to the Supreme Court, and *Re Fergie*, 24 V.L.R., at p. 417.

(m) *Supreme Court Rules*, 1884, r. 15, *post*.

(n) *Ibid*, r. 12. *Vide*, however, s. 27 (3), Act of 1897.

## CHAP. II.

Voluntary  
sequestration  
costs.

Priority.

Scale of  
petitioning  
debtor's costs.

Costs of petition-  
ing creditor.

The costs of a voluntary sequestration, when taxed, are paid by the assignee or trustee out of the estate (o), and are so paid in priority to the assignee's remuneration and to any rent incurred by the trustee (p). They are so payable in priority to the assignee's charges, assuming that there are assets sufficient in the estate to raise the question; but on the other hand, if a person is elected a trustee and there should be no assets or not sufficient to pay both, he has in any case to pay the assignee his solatium and the charges allowed by the Court for the interim management, as s. 54 (1), Act of 1890, imposes such payment on the trustee, and the assignee could sue the trustee even though he had obtained no assets with the estate (q). S. 34, Act of 1890, imposes on the trustee a statutory duty to pay the taxed costs of a voluntary sequestration "out of the estate." S. 54, unlike s. 34, does not make the insolvent estate the fund from which the payment is to come. S. 123 provides for the "manner" or "order" of applying the proceeds of the insolvent estate, and sub-s. 1 thereof includes contracts entered into by the trustee resulting in claims for taxed costs, charges, allowances and expenses properly incurred, and also statutory obligations to pay not provided for by other sections, such as costs of compulsory sequestration and the assignee's remuneration. Reading s. 34 with s. 123, sub-s. 1, the costs of a voluntary sequestration are payable by the trustee in the execution of his office of trustee (r). For the scale of the petitioning debtor's solicitor's costs, *vide* Appendix 2 (1).

The assignee or trustee must reimburse the petitioning creditor out of the first money received (s)—that is the first money received by the trustee belonging to the estate, and there is an unqualified duty cast upon the trustee out of the first money that comes to his hand to reimburse the petitioning creditor. S. 123, Act of 1890, would appear to support that view. It provides, *inter alia*, "(1) in payment of all taxed costs, 'charges, allowances, and expenses properly incurred by or payable by him in the execution of his office of trustee.' These

(o) S. 34, Act of 1890.

(p) *In re Greathead*, 8 A.L.T., 131; and *vide* s. 123 (1 and 2), Act of 1890, and r. 154.

(q) *In re Bower*, *ibid*, 159.

(r) *Ibid*.

(s) S. 40, Act of 1890, and it is directed by this section that the costs incurred under any sequestration shall be paid out of the insolvent estate.



last words, "payable by him in the execution of his office of trustee," in no way include the payment of the petitioning creditor's costs, with which the trustee has nothing whatever to do beyond the direction to him to pay them out of the first money that comes to his hands. S. 123 relates to the distribution of the estate after it has been got in, and provides for the mode of distribution, but s. 40 relates to the payment of the petitioning creditor's costs long before the estate is got in (*t*). CHAP. II.

If the respondent appear and notice of opposition has been given, the order *nisi* may be made absolute or discharged with or without costs, as may be just (*u*). Opposed petitions.

If the rule *nisi* be first in time the resolution under the provisions relating to composition will not defeat it, and therefore not interfere with the costs (*v*), but where the petitioning creditor had notice that a preliminary resolution for composition under s. 154 was passed before he obtained an order *nisi* the same was discharged with costs against him (*w*). Effect of subsequent composition resolution.

Where a solicitor who is petitioning creditor acts as his own solicitor in the proceeding he is entitled to full costs, and not merely money out of pocket (*x*) on the analogy of an attorney suing in his own right (*y*). Costs when petitioning creditor is solicitor.

A debtor's summons is a preliminary step to a petition when the service of the same is the act of insolvency relied on, and should be allowed in the petitioning creditor's costs (*z*). The Court declined to give costs against a petitioner who had petitioned on a deed which the trustees had refused him inspection of and which deed did not fall within s. 37, sub-s. 1 (*a*). Costs of debtor's summons included in petitioner's costs.  
Petitioner's costs when inspection of deed refused.

The petitioning creditor must prosecute at his own cost all the proceedings in the sequestration until after the close of the meeting for the election of trustee and he is reimbursed as indicated above (*b*). His costs as to the seizure of certain goods of which the estate received the benefit were allowed in *Ex parte Christy, re Barrow*, and *Ex parte Hadfield, re Burrow* (*c*). Generally.  
Specially.

(*t*) *In re Stiles*, 16 A.L.T., at p. 210.  
(*u*) S. 47, Act of 1890.  
(*v*) *Re Marie*, 3 A.J.R., 6.  
(*w*) *In re White*, 2 V.R. (I.), 42.  
(*x*) *Ex parte Chamberlayne*, 19 L.J. (N.S.) Bk., 10.  
(*y*) *Ibid*.

(*z*) *In re Bunnnett, ex parte Jeavons*, 3 Ch. D., 320.  
(*a*) *In re Haslam*, 3 V.L.R. (I.), 10.  
(*b*) *Vide* s. 40, Act of 1890.  
(*c*) 3 Mont. & Ay., p. 90; but see *In re Kingsland*, 6 W.W. & A'B. (I.), 25, where costs incurred by petitioning

<p>CHAP. II.</p> <p>Costs between orders <i>nisi</i> and <i>absolute</i>.</p>	<p>and the petitioner's solicitor may be allowed all proper charges at the rate specified in the scale for all work necessarily or usefully done in the interests of the creditors generally for the protection or benefit of the estate between the order <i>nisi</i> and the date of the order <i>absolute</i>, providing the trustee certify that the work done was necessary or useful (<i>d</i>), and if he certify in exceptional circumstances that the solicitor, prior to the presentation of the petition, has rendered special services in the interests of the creditors generally, and such services have assisted to preserve or increase the assets or otherwise been of substantial advantage to the estate, the taxing officer may upon a certificate signed by the trustee to that effect allow all proper charges for such services at the rate specified in the scale (<i>e</i>). It is right that a man should have legal advice and assistance against a petition, and money therefore <i>bond fide</i> paid by a debtor to his solicitor to defray costs in opposing sequestration proceedings that have been commenced against him cannot, should the petition be successful, be recovered from the solicitor by the trustee (<i>f</i>). It was stated in the judgment in this case that it would be impossible to hold that whenever a solicitor has received instructions to oppose such proceedings, has done his work and is paid for his services, if the petition is ultimately successful the money that has been paid to him may be recovered from him by the trustee.</p>
<p>Costs prior to petition.</p>	
<p>Respondent's costs when order made <i>absolute</i>.</p>	
<p>Respondent's costs when order <i>nisi</i> abandoned.</p>	<p>The respondent is entitled to his costs of coming to Court to have the order <i>nisi</i> discharged where the order <i>nisi</i> has been abandoned, though costs up to date of the intimation of the abandonment be tendered (<i>g</i>). Where the sequestration sought was that of a firm, but the two members appeared separately and submitted the same defence, the respondents on succeeding were allowed one set of costs only of the hearing and of the subsequent appeal (<i>h</i>).</p>
<p>Costs of joint respondents.</p>	
<p>When order discharged.</p>	<p>The order may be discharged with or without costs as may be just (<i>i</i>), and the respondent if he fairly takes an objection at the</p>
<p>creditor in investigating insolvent's dealings and protecting estate were disallowed.  (<i>d</i>) Appendix 2, (3), <i>post</i>.  (<i>e</i>) <i>Ibid</i>.  (<i>f</i>) <i>In re Sinclair, ex parte Payne</i>,</p>	<p>15 Q.B.D., 616 ; 2 Morrel, 255.  (<i>g</i>) <i>In re Blume</i>, 15 V.L.R., 812.  (<i>h</i>) <i>In re Thomas and Cowie</i>, 9 V.L.R. (I.), 2, 16.  (<i>i</i>) S. 47, Act of 1890.</p>

proper time is generally entitled to his costs (*k*). Where the objection was taken by the Court and not by counsel for the respondent no costs were allowed (*l*). Where the order *nisi* has been discharged with costs which had been taxed but not paid, the issue of an order absolute upon a subsequent order *nisi* by the same petitioning creditor was ordered to be delayed until such costs had been paid (*m*). The practice of the Court, as the Acts and Rules are apparently silent on the matter, has been to disallow the insolvent the costs of filing his schedule when his estate has been compulsorily sequestrated. Though the Court may have power to set off the costs of the respondent when the order *nisi* is discharged with costs against the petitioning creditor's debt it will not, it has been held, always do so (*n*). A person who obtains an order *nisi* and accepts payment or other satisfaction or security indicated by s. 50, Act of 1890, is liable for all the costs incurred by any other creditor in obtaining the the revival of the sequestration under the provisions of that section (*o*). This section, however, does not deprive the reviving creditor of his right to costs out of the estate as a petitioning creditor. When a sequestration is revived under s. 49, Act of 1890, it is proceeded with as if the order *nisi* had been originally obtained by the reviver, and he is, consequently, entitled to the same rights as a petitioning creditor. The costs of adjournment when the order *nisi* is not served are dealt with by the Court as may seem just (*p*).

CHAP. II.

When order discharged and subsequent order granted.

Costs of schedule in a compulsory sequestration.

Setting off.

Costs of revival of sequestration under s. 50, Act of 1890.

Under s. 49.

Costs of adjournment when order *nisi* not served.

The Full Court has power to make such order as to the whole or any part of the costs of appeal as may be just (*q*). The general rule is that the successful appellant gets his costs (*r*). There is however, a discretion in the Court under Order 65, r. 1, and in a proper case a successful appellant may be deprived of his costs, as when he fails to prove fraud alleged, and succeeds on a point of law, or where he succeeds on a point not raised in the Court below, or on evidence not before the Court below (*s*), or where the appeal is only partially successful. When two respondents to an appeal from an order discharg-

Costs of appeal in compulsory sequestration proceedings.

Successful appeals.

(*k*) *In re Phlean*, 3 W.W. & A.B. (I.),

3.

(*l*) *In re Barry*, 1 W. & W. (I.), 174.

(*m*) *In re Harward*, 4 V.L.R. (I.), 65; *In re Fraser*, 6 V.L.R. (I.), 20.

(*n*) *In re Whitesides*, 3 A.J.R., 115.

(*o*) S. 50, Act of 1890.

(*p*) S. 46, Act of 1890.

(*q*) Judicature Rules, Order 58, r. 4.

(*r*) *Vide* Announcement, 1 C.D., 41.

(*s*) *Vide* Annual Practice, note to Order 58, r. 4, and cases there cited.

## CHAP. II.

Unsuccessful  
appeals.

ing an order *nisi* appeared separately only one set of costs was allowed, their notices of opposition being the same, and there being no reason why they should have appeared separately (t). An unsuccessful appeal is generally dismissed with costs. but it may be, under special circumstances without costs (u). In cases of extreme doubt or difficulty the unsuccessful appellant or respondent may not be ordered to pay costs (v), and where the respondent succeeds on a preliminary objection without giving notice to the appellant of his intention to raise the objection, and the nature of it, at the earliest moment, the appeal has sometimes been dismissed without costs (w).

Costs of appeal  
from Insolvency  
Court.

The same principles are applicable to appeals from the Court of Insolvency as in the insolvency jurisdiction of the Supreme Court, as, for instance, a successful appellant from the Insolvency Court will, as a general rule, be entitled to his costs (x). The Supreme Court, however, may, on such appeals, confirm, reverse or vary the order appealed from, with or without costs, as it may think fit (y). Where the Act was new and the rules insufficient, and the judge had to invent a practice, the appeal was allowed without costs (z).

Rule as to costs  
of certificate  
appeals.

The rule, apart from exceptional cases, in appeals by the insolvent from the refusal of the certificate, is not to discourage trustees and creditors from supporting the decision of the Court below by awarding costs against them, and the general rule, therefore, in allowing such appeals by the insolvent is to do so without costs but they may be allowed to him out of the estate (a), and the insolvent may be ordered to pay the costs of an appeal by creditors from the order on the certificate application (b).

Costs on certifi-  
cate application.

An insolvent is not entitled to have any of the costs of or incidental to his application for a certificate of discharge allowed out of the estate, but the Court may make such order as it thinks

(t) *In re Thomas and Cowie*, 9 V.L.R. (I.), at p. 16.

(u) *Vide* Annual Practice, *ante*.

(v) *Vide ex parte Walton*, 17 C.D., p. 758; *Re Mersey Railway Company*, 37 C.D., 610.

(w) *Vide re Speight, ex parte Brooks*, 13 Q.B.D., 42; *Ex parte Blease, re Blinkhorn*, 14 Q.B.D., 123; but see *Ex parte Shead re Mundy*, 15 Q.B.D., at p. 338.

(x) *Ex parte Masters, in re Winson*, 1 Ch. D., 113.

(y) S. 11, Act of 1890.

(z) *In re Fisher, ex parte Greenlaw*, 2 V.R. (I.), at p. 33.

(a) *In re M'Intyre*, 11 V.L.R., 312; *Re Cabena*, 2 A.L.R., at p. 88; 17 A.L.T., 286. *In re Nicholas*, 7 Morrell, 54.

(b) *Vide Ex parte Castle Mail Packets Company, in re Payne*, 18 Q.B.D., 154.

fit as to the costs incurred by the trustee or the official accountant or any creditor as to the same (c), and the Court may adjourn the hearing of the application until the costs, charges, and expenses of the assignee and trustee allowed by the court or the rules are paid (d). CHAP. II.

Where any question or questions are stated in a special case for the opinion of the Court of Insolvency under s. 15, Act of 1890, the parties may, if they think fit, agree that the decision may be either with or without costs. As to the costs of a special case submitted to the Supreme Court, that Court has full power and discretion in respect to the same, or it may, if it think fit, reserve the question of such costs for the consideration of the Court (e). Costs on special case.

If it appear to the Attorney-General upon the application of the assignee or trustee that inquiries or proceedings relating to an insolvent estate ought to be instituted or carried on or any prosecution ought to be carried on against any person for any offence under the Acts, and that there are no funds in the particular estate available for such inquiries, proceedings or prosecution, the Attorney-General may direct the payment of the costs of any such inquiries, proceedings, or prosecution after taxation thereof out of the "Insolvency Suitors' Fund," and upon every such order the Governor issues his warrant for the payment of the amount of such taxed costs and the Treasurer pays the same out of the said fund (f). Costs payable out of Suitors' Fund.

Where the defendant is desirous of paying money into Court under r. 50 he must also pay with it the costs (if any) fixed by the judge seven clear days before the day appointed for the hearing (g), and if notice of acceptance in satisfaction be not given, and the plaintiff fails to recover more than the amount paid in, he must pay the defendant's costs, and the money paid into Court remains there until after the hearing as security for the payment of such costs (h). Costs where money paid into Court.

In liquidation by arrangement, the property of the estate is distributed in the same manner as in an insolvency so Costs under liquidation by arrangement.

(c) R. 311.

(d) R. 309.

(e) S. 9 (3), Act of 1897.

(f) S. 127, Act of 1890.

(g) R. 50.

(h) R. 51.

**CHAP. II.** far as applicable (*i*), and all proper costs of and incidental to the proceedings prior to the passing of the resolution are paid by the trustee out of the estate in like manner, and priority as to the costs of a petitioning creditor in insolvency (*j*). When a sequestration occurs pending proceedings for or towards liquidation by arrangement or composition with creditors, the proper costs incurred in relation to such proceedings are paid by the trustee under the sequestration out of the debtor's estate unless the Court otherwise orders (*k*). No costs incurred by a debtor of or incidental to an application to approve of a composition are allowed out of the estate if the Court refuses to approve the composition (*l*).

Under liquidation by arrangement and composition when sequestration occurs.

Costs of execution creditor prevented by sequestration from selling.

Any creditor who is prevented by sequestration from selling under an execution levied before the order of sequestration is entitled to be paid his taxed costs not exceeding £50 incurred in the action, suit or other proceeding under which such execution issued out of the proceeds of such insolvent estate (*m*).

Costs as to examinations.

Except where the trustee has been directed by the Court or requested by at least one fourth in number or value of the creditors who have proved to cause any examination to be held, the Court may, at its discretion, order that the trustee be not allowed the costs or any part of the costs of such examination, or may order the trustee to pay such costs or any part thereof (*n*); and where the Court exercises its power to order on an examination payment of an admitted debt, or the delivery to the trustee of such property admittedly belonging to the estate, it may do so with or without costs of the examination and order (*o*). In any case in which the sanction of the Court is obtained as to dealings with the estate under ss. 51 or 52, Act of 1897, the costs of obtaining such must be borne by the person in whose interest such sanction is obtained, and is not payable out of the debtor's estate (*p*).

Costs as to admitted debt or property in an examination.

Costs of obtaining sanction to dealings with estate, under ss. 51 or 52, Act of 1897.

Costs as to witnesses.

Witnesses are entitled to conduct money and allowances mentioned in the Appendix, Part 3, *post*, and their allowance for

- (i) S. 153 (7), Act of 1890.
- (j) R. 422.
- (k) R. 407.
- (l) R. 442.
- (m) S. 77, Act of 1890.
- (n) S. 111 (6), Act of 1897.

- (o) S. 111 (4 and 5), Act of 1897. As to the like power in relation to examinations taken before a police magistrate, *vide* s. 112 (5), *ibid*.
- (p) R. 365.

attendance must in no case exceed the highest rate of the allowance mentioned in the scale of costs (*q*). The Court may in any manner limit the number of witnesses to be allowed on taxation of costs (*r*), and the costs of witnesses, whether they have been examined or not, may in the discretion of the Court be allowed (*s*). The insolvent and every other person summoned as a witness under s. 135, Act of 1890, for examination is entitled to the same conduct money and expenses as a witness in any civil suit (*t*). There is no similar provision for the payment of the insolvent under s. 134, and which applies only to the insolvent. The examination under the latter section is held by order of the Court, and if he fails to attend without good cause shown he may be arrested by warrant (*u*). As to conduct money generally, rule 84 provides that any witness required to attend for the purpose of being examined or of producing any document is entitled to the like conduct money, payment of expenses and loss of time, as upon attendance at a trial in the Supreme Court.

CHAP. II.

Conduct money.

Though male witnesses are allowed certain sums, according to their professions or occupations, there is no distinction made in regard to females. Ten shillings, therefore, is the highest remuneration a female witness is entitled to if she resides at the place of trial or in the neighbourhood, and one pound if resident at any other place (*v*).

Female witnesses.

The Court has no power to award costs against a witness who attends for examination under Part VII., Act of 1890 (*w*), except under s. 111 (sub-ss. 4 and 5), Act of 1897, and a witness summoned for examination is not entitled to the costs of employing a solicitor or counsel, but is only entitled to the ordinary allowance. He may have counsel present to protect him, but at his own expense (*x*).

Costs against a witness.

Costs as to counsel for witness.

Auctioneers' charges and accountants' charges are set out in Part 4 of the Appendix.

Auctioneers' charges and accountants' charges.

(q) R. 76.

(r) *Ibid.*

(s) R. 77.

(t) S. 135, Act of 1890.

(u) S. 129 (3), Act of 1890.

(v) *In re Abrahams*, 17 A.L.T., 35;

1 A.L.R., 29.

(w) *In re Sinclair, ex parte Watson*, 15 V.L.R., 736.(x) *Ex parte Waddell, in re Lutscher*, 6 Ch. D., 328, 332. *Vide also In re Sheppard Reeves*, 1 A.L.T., 7.

## CHAP. II.

Government fees  
as to deeds of  
arrangement.

Court fees.

Assignee's costs.

Gross assets.

Remuneration if  
no trustee  
elected.

Costs of employ-  
ment of solicitor  
by assignee

The scale of Government fees as to deeds of arrangement are set out in the second schedule to the Act of 1897, *post*.

The scale of fees set out in the Appendix (Part 5) are the fees to be charged in respect to proceedings under the Acts, and to be taken in Court or any office connected with the Court (*y*).

If a trustee be elected by the creditors or appointed by the committee of inspection, such trustee must pay to the assignee for his own use and benefit, in addition to such costs, charges and expenses as may be allowed by the Court or judge for the interim management of the estate, the sum of £5 when the gross assets do not exceed £200 in value, and £10 when the assets exceed £200 (*z*). The assignee, in addition to the £5 or £10 fee, as the case may be, is only entitled to the costs, charges and expenses which he has actually paid or disbursed (*a*). The fee is calculated on the gross assets realised, not the gross assets scheduled (*b*), and where the only assets in the estate consists of land mortgaged the gross asset is the value of the right of redemption (*c*), that is the difference between the price realised on the mortgaged land and the amount of the mortgage (*d*). If no trustee be elected or appointed the assignee receives such remuneration as the creditors at a meeting decide, or failing such meeting, as the Court awards, not exceeding £5 per cent. on the gross assets of the estate (*e*). If the assignee is appointed trustee by the creditors, which the section quoted appears to contemplate, then the provisions relating to the remuneration of trustees apply (*f*).

Part 2 (3) of the Appendix makes provision as to the scale of costs where the assignee employs a solicitor.

(*y*) R. 451.

(*z*) S. 54 (1), Act of 1890.

(*a*) *Re Best*, 9 A.L.T., 32. Worthington, J., in this case said:—"The words on which the question arises are 'costs, charges and expenses.' 'Costs and expenses unquestionably only mean money paid out of pocket. 'The word 'charges' is susceptible of two meanings. It may mean what assignees demand or charge as remuneration for trouble, or it may mean charges to which they have been put or have incurred. Wherever the word 'charges' is associated with the words 'costs and expenses' as it is here, it has invariably, as I believe, received the latter interpretation, and means charges incurred.

"'Costs, charges and expenses' is a well-known collation of words commonly used with respect to trustees or others occupying a fiduciary position, and has never, so far as I am aware, been construed so as to carry remuneration." (The charges allowed by Noel, J., were:—Warrant, £1 1s; Inventory, £1 1s; Messenger, £2 2s; Copy Schedule, £1 1s; Stationery, &c., £1 1s.—Total, £6 6s.)

(*b*) *Vide In re Greathead*, 8 A.L.T., 131.

(*c*) *In re Kauffman*, 17 A.L.T., 36.

(*d*) *In re Hayes*, *ibid*, 164; 1 A.L.R., 128.

(*e*) S. 54 (2), Act of 1890.

(*f*) *Vide infra*.



The ordinary remuneration of the trustee is fixed by the **CHAP. II.** creditors at the meeting at which he is elected, or as they may from time to time determine (g). When the creditors appoint the trustee, his remuneration, if any, is fixed by a resolution of the creditors, or if the creditors so resolve by the committee of inspection, and it must be in the nature of a commission or percentage on the net amount realised and available for distribution (h). Rule 358, *post*, contemplates a commission or percentage payable on the amount realised and on the amount distributed in dividend. In calculating the percentage on the amount realised sums paid to secured creditors (in respect of their securities) and moneys expended in carrying on the trade or business must be deducted from the total receipts (i). Rule 358 also provides that the percentage payable on dividend must not be charged until the dividend is in course of payment. The creditors of each estate and the committee of inspection (if duly authorised) when joint and separate estates are being administered, may fix the amount of remuneration in each case (k). The vote of the trustee or of his partner, clerk, barrister and solicitor, or barrister and solicitor's clerk, either as a creditor or as a proxy for a creditor, cannot be reckoned in the majority required for passing any resolution affecting the remuneration (l), and except as provided by the Acts no trustee is entitled to receive out of the estate any remuneration for services rendered by any person to the estate (m). Neither is the trustee entitled, except as provided by the Acts and rules, to receive out of the estate any remuneration for services rendered to the estate except that to which he is entitled under the Acts and Rules as trustee (n). Neither is he entitled to make a profit charge in respect of keeping possession of the debtor's estate, but only to charge the amount actually paid (o). If one-fourth in number or value of the creditors dissent from the resolution fixing the remuneration, or the insolvent or any creditor satisfies the Court that the remuneration is unnecessarily large, the Court fixes the amount of

Trustee's costs.  
Ordinary remuneration.

Nature of it.

Calculation of percentage.

Apportionment in joint and separate estates.

Voting power of as to remuneration.

Limit of remuneration.  
Power of Court to reduce remuneration.

(g) S. 53 (i.), Act of 1890.

(h) S. 20, Act of 1897—compare *Bankruptcy Act* 1883, s. 72.

(i) R. 358.

(k) R. 291.

(l) S. 26, Act of 1897—compare *Bankruptcy Act* 1883, s. 88.

(m) S. 21, *ibid*—compare r. 306, *Bankruptcy Rules* 1886.

(n) R. 359.

(o) *Ibid*. The possession must be terminated at the earliest possible date.

CHAP. II. the remuneration (*p*). The Court has power, on a proper application, to fix the remuneration of the trustee, whether fixed by the creditors or the committee of inspection (*q*).

Resolution to express expenses covered by remuneration.

The resolution of the creditors must express what expenses (if any) the remuneration is to cover, and no liability other than the right of the trustee to receive such remuneration attaches to the insolvent's estate or to the creditors in respect of any expenses which the remuneration is expressed to cover (*r*).

When no remuneration voted.

Where no remuneration has been voted to a trustee he is allowed out of the insolvent's estate such proper costs and expenses incurred by him in or about the proceedings in insolvency as the Court may allow (*s*). Subject to the statutory provisions referred to the trustee is entitled to the proper expenses *bond fide* incurred in the administration of the estate (*t*).

Allowance of certain costs.

Costs have been allowed for the apprehension of a bankrupt (*u*)—travelling expenses properly undertaken for the benefit of the estate (*v*), charges incurred for prosecutions for perjury and conspiracy (*w*), and charges incurred by the petitioning creditor in seizing and obtaining property of which the trustees afterwards have the benefit (*x*). If a trustee is an accountant he is unable to charge for work done as an accountant (*y*), and the principle is the same whether he be a partner in a firm of accountants or upon his own separate account (*z*). If the trustee is not an accountant, and is unable to discharge his duty to the creditors as to accountancy without calling in the aid of an accountant, he is justified in calling in such aid (*a*), and where any trustee receives remuneration for his services as such no payments are allowed in consequence or in respect of performance by any other person of the ordinary duties which are required by any Act or Rules to be performed by himself (*b*).

As to accountancy.

(*p*) S. 22, *ibid*—compare *Bankruptcy Act* 1883, s. 72 (2).

(*q*) *In re Gallard, ex parte Harris*, 9 Morrell, 52; (1892) 1 Q.B., 532.

(*r*) S. 23, Act of 1897—compare *Bankruptcy Act* 1883, s. 72 (3).

(*s*) S. 24, *ibid*—compare *Bankruptcy Act* 1883, s. 72 (4).

(*t*) *Vide Ex parte De Tastet, re Latham*, 2 G. & J., 403.

(*u*) *Ibid*.

(*v*) *Ex parte Joyner, re Sharp*, 2 Mont. & Ay., 1; *Ex parte Lovegrove, re Cooper, ibid*, 4.

(*w*) *Vide Ex parte Strange, re Allmod*, Mont. & McA., 31.

(*x*) *Ex parte Christy, re Barrow*, 3 Mont. & Ay., at p. 90. *Vide also s. 40, Act of 1890*.

(*y*) *Ex parte Read, re Sowerby*, 1 G. & J., 77.

(*z*) *Ibid*.

(*a*) *Ex parte Anthony, in re Richards*, 2 G. & J., 177. *Vide also s. 27 (3), Act of 1897, as to taxation of these charges. As to scale of Accountants' charges, vide Appendix, Part 4.*

(*b*) S. 27 (1), Act of 1897. This is

Where the trustee is a barrister and solicitor, the remuneration for his services as trustee includes all professional services unless it be otherwise provided on his appointment (c), and this view has also been taken in regard to the law costs in the estate when the trustee's partners have acted as solicitors to him, the principle being that a person having a duty to perform should not place himself in such a situation that his interest conflicts with his duty (d). In such an appointment the percentage should be sufficiently large to cover the reasonable professional charges (e). The remuneration is in the nature of a percentage or commission (f), and the creditors have no power to pass a resolution directing that the remuneration shall be the proper professional charges of a solicitor for work done and expenses incurred by him in or about the bankruptcy proceedings (g).

## CHAP. II.

Remuneration where the trustee is a barrister and solicitor.

No assignee or trustee can, under any circumstances whatever, directly or indirectly make any arrangement for, nor can he nor his wife, child partner, agent, clerk, barrister and solicitor or servant, either directly or indirectly, accept from the insolvent or any barrister and solicitor, auctioneer or any other person who may be employed about the insolvency, or with whom any contract, express or implied, may be made in connection with the insolvency, any commission, discount, share of commission or discount, gift, or any gift, remuneration, or pecuniary or other consideration or benefit whatever beyond the remuneration fixed by the creditors or committee of inspection, or allowed by the Insolvency Acts and payable out of the estate, nor can he directly or indirectly make any arrangement for giving up, or give up any part of his remuneration to the insolvent or any creditor or any member of the committee of inspection or any barrister and solicitor, auctioneer, or other person whomsoever that may be employed about the insolvency. Every assignee and trustee contravening such provision, and every person who is a party to such contravention, is guilty of a misdemeanour (h). If it appears to

Trustee not to share remuneration with or of other persons.

Contravention of same a misdemeanour.

declaratory of the principle that the trustee cannot be allowed amounts paid to an agent for work which he as trustee should have done himself. *Vide Ex parte Anthony, ante.*

(c) S. 27 (2), Act of 1897—compare *Bankruptcy Act 1883*, s. 73 (2).

(d) *In re Byrne*, 2 A.L.R., 24; 17 A.L.T., 232. *Vide s. 27 (1), Act of*

1897.

(e) *Vide In re Wayman, ex parte The Official Receiver*, 24 Q.B.D., 68; 6 Morrell, 272.

(f) S. 20, Act of 1897.

(g) *In re Wayman, ante.*

(h) S. 25, Act of 1897—compare *Bankruptcy Act 1883*, s. 72 (5).

## CHAP. II.

Court may disallow remuneration for solicitation.

the satisfaction of the Court that any solicitation has been used by or on behalf or with the consent of a trustee in obtaining proxies or in procuring the trusteeship except by the direction of a meeting of creditors, the Court has power, if it think fit, to order that no remuneration be allowed to the person by whom, or on whose behalf such solicitation may have been exercised, notwithstanding any resolution of the committee of inspection or of the creditors to the contrary (*i*).

Remuneration in liquidation by arrangement.

The creditors at the general meeting called by the debtor may, by special resolution, fix the remuneration of the trustee, or leave it to a subsequent general meeting (*k*).

Law costs incurred by trustees.

Subject to s. 27 (3), Act of 1897, the trustee may take advice on any legal question affecting the insolvent estate, or the administration thereof, and may employ an attorney or solicitor to commence, conduct or defend actions and suits or any other proceedings for or against the insolvent estate, and may charge against such estate all fees allowed upon taxation by the proper officer (*l*); but he is only authorised to pay taxed costs (*m*), and the Court may, upon the complaint of any creditor or person pecuniarily interested, inquire into and allow or disallow, as may be just, all or any part of the costs, charges, expenses and payments charged, claimed or made by the assignee or trustee, and make such order thereon as the Court may think fit (*n*). In a case where the assets were insignificant it was held that the insolvent was not a person necessarily interested within the meaning of s. 125 (*o*). This provision guards against improvident costs incurred by the trustee in substitution of the rights creditors had under the former Acts of objecting to the plan of distribution of the estate by application to the Supreme Court (*p*). Costs have been disallowed on the ground that so far as the assignee had succeeded all that he procured might have been obtained by asking for it without litigation (*q*). Costs of the plaintiff and of the assignee who was a defendant, were allowed where by the judgment the assignee had to pay both, the claim of the plaintiff being so

Chargeable to estate upon taxation.

Court may disallow costs, &c.

(*i*) S. 19, Act of 1897—compare *Bankruptcy Act* 1883, Schedule I., paragraph 20.

(*k*) R. 413.

(*l*) S. 80, Act of 1890.

(*m*) S. 123, *ibid*.

(*n*) S. 125, *ibid*.

(*o*) *Re Fieldhouse*, 17 A.L.T., 149; 1 A.L.R., 127.

(*p*) *Vide* 28 Vict. No. 273, ss. 95 to 100.

(*q*) *Re Were*; *vide Ex parte Bank of Australasia*, in *re Rutledge*, 2 W. & W. (L.), at p. 61.

reduced that the defence gave a balance of advantage to the estate (*r*), it being held that as the assignee was a defendant, and not a plaintiff, and acted under advice of his solicitor, he was not to blame. CHAP. II.

The solicitor to the trustee has no lien for his costs upon property of the insolvent, recovered by him for the trustee as such solicitor (*s*); but he has upon documents the product of his own labour or money (*s*). Trustee's solicitor's lien.

In instituting proceedings, the assignee or trustee should exercise the same careful discretion that a man exercises in his own concerns, and he should be indemnified if he exercises an independent and reasonable discretion, or if he places himself in the hands of the bulk of the creditors, and continues the litigation only so long as they think fit (*t*). Costs are not disallowed from the estate unless the trustee has acted improperly (*u*). On application to vary or disallow certain costs incurred and defrayed by the assignees, the items were dealt with as follows:—Costs of a suit instituted by them to set aside a settlement by the insolvent as fraudulent against creditors were allowed. The assignees were successful, but it was contended that there were sufficient other assets to pay the creditors in full. Plaintiffs costs of certain motions made by the insolvent in such suit, and refused without costs were allowed, and also the costs, of opposing insolvent's certificate (*v*). Cost of proceedings instituted by the assignee or trustee.

The rule is that the trustee who takes up the defence of an action which was commenced by a bankrupt puts himself entirely in his place with respect to costs (*w*), and therefore the assignee or trustee makes himself liable for the whole costs of an action to which the insolvent was a party, which he takes up and continues in his own name unsuccessfully, and such costs include those which the insolvent had been ordered to pay before the trustee intervened (*x*). Costs as to adoption of an action by the trustee.

(*r*) *In re Yorston and Webster, ex parte McEwan*, 1 W. & W. (I.), 133.

(*s*) *In re Humphreys, ex parte Lloyd-George*, (1898) 1 Q.B., 520, 5 Man. 11; vide also *In re McKay and Bell*, 3 A.J.R., 98. Vide s. 48 Act of 1890. *Ex parte Galden, re Austin*, 4 C.D., 129.

(*t*) *In re Harper, ex parte Duke*, 1 W. & W. (I.), 86-92.

(*u*) Vide authorities referred to, *ante*.

(*v*) *In re Kingland*, 6 W.W. & N.B. (I.), 25.

(*w*) *Watson v. Holliday*, 20 Ch. D., at p. 785.

(*x*) *Crotty v. Anderson*, 2 A.L.R., 84; 17 A.L.T., 284; 22 V.L.R., 120. In this case, Williams, J., observes:—"The question substantially raised in this appeal is whether when an assignee elects to take up or continue an action under s. 80 of the Act, it is not either a rule of law or of practice that if unsuccessful he should pay the costs of the whole action . . . It

## CHAP. II.

Court may disallow remuneration for solicitation.

Remuneration in liquidation arranged.

Let it

the satisfaction of the Court

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proxies or in

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On unsuccessful contested applications to the Court by the trustee the costs should follow the event, and the trustee be ordered to pay same, which in a proper case he may recover from the estate (z). Where the difficulty in the case arose upon the language of the Statute, and the trustee's application was unsuccessful, an order was refused against the trustee, but the costs of all parties were ordered to be paid out of the fund in dispute which was after-acquired property claimed by the trustee after the close of the bankruptcy (a). The Court of Insolvency, where it has been satisfied that the trustee in making an unsuccessful application has done so in discharge of his duty, has frequently in practice made the order without costs.

Costs of proof of debt.

The costs of making a proof of debt must be borne by the creditor unless the Court otherwise specially orders (b).

"seems to me that it is a rule of practice. When he does so it may be that the principle is that he virtually takes the benefit of all prior proceedings, that he has no *locus standi* unless he does, and therefore when he intervenes he takes *ex necessitate* the benefit of all the proceedings in the action by the person he represents. There is another principle upon which the practice may be based. Reading ss. 79 and 80, coupled with the decision in *Boynton v. Boynton*, 4 App. Cas., 733, the principle is this, that once he intervenes, he becomes

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by

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## CHAP. II. the satisfaction

Court may disallow remuneration for solicitation.

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*IN ANOTHER CASE, WHERE THE TRUSTEE ADOPTED THE BANKRUPT'S DEFENCE, AN INTERLOCUTORY ORDER HAVING BEEN MADE AGAINST THE DEFENDANTS IN THE ACTION, AND SHORTLY AFTER GIVING NOTICE OF APPEAL THEY BECAME BANKRUPT, AN ORDER WAS MADE FOR CARRYING ON THE PROCEEDINGS AGAINST THEIR TRUSTEE. THE TRUSTEE GAVE NOTICE TO THE PLAINTIFF THAT HE WOULD NOT PROCEED WITH THE APPEAL, BUT SHORTLY AFTER THIS ENTERED AN APPEARANCE AND CALLED FOR A STATEMENT OF CLAIM. HE DECLINED TO UNDERTAKE TO PAY THE COSTS OF THE APPEAL INCURRED BY THE PLAINTIFF BEFORE THE NOTICE THAT THE APPEAL WOULD NOT BE PROCEEDED WITH, AND THE APPEAL CAME ON THAT THE QUESTION AS TO COSTS MIGHT BE DECIDED. IT WAS HELD THAT THE APPEAL MUST BE DISMISSED WITH COSTS TO BE PAID BY THE TRUSTEE, FOR THAT, HAVING ADOPTED THE DEFENCE OF THE BANKRUPTS, HE HAD PLACED HIMSELF IN THEIR POSITION AS TO THE WHOLE OF THE ACTION, AND COULD NOT REJECT PART OF THE PROCEEDINGS IN IT (y).*

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CHAP. II. such forms are applicable any costs occasioned by the use of any other or more prolix forms must be borne by or disallowed to the party using the same unless the Court otherwise directs (*k*). The Court or judge may from time to time alter any forms or substitute new forms in lieu thereof (*l*).

(*k*) R. 5.

(*l*) *Ibid.*



## CHAPTER III.

### VOLUNTARY SEQUESTRATIONS.

- |  |  |
|--|--|
| 1.— <i>Individual Estates.</i>                     | 4.— <i>Persons who can Voluntarily Petition.</i>   |
| 2.— <i>Partnership Estates.</i>                    | 5.— <i>Deceased Persons' and Trust Estates.</i>    |
| 3.— <i>Districts in which Petitions Presented.</i> | 6.— <i>Declarations of Inability to pay Debts.</i> |

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#### 1.—INDIVIDUAL ESTATES.

UPON petition (*a*) to the Court in writing of any person setting forth that he is insolvent and desirous of surrendering his estate for the benefit of his creditors, a judge or chief clerk may, upon proof thereof to his satisfaction, accept the surrender of such estate, and by order under his hand (*b*) place the same under sequestration in the hands of one of the assignees (*c*). Individual estate.

The petition must be attested by a solicitor or the chief clerk, and accompanied by an affidavit (*d*) of the insolvent containing the following particulars:—(1) Verification of the statements in the petition. (2) When the petitioner first became unable to pay his debts in due course as they became due, and the cause of such inability. (3) What books of account he has kept, or if he has kept none, what documents he has (if any), and of what kind, which will show the state of his affairs (*e*). These particulars are required by r. 166, but the form itself prescribes further particulars (*f*), and r. 167 enacts that every petition must be accompanied by a schedule containing the particulars specified in the Schedule of Forms No. 4, and verified by the affidavit of the insolvent in the form in the schedule, and if the schedule has been prepared wholly or in part by any other person or persons, then it must be verified The petition.

Particulars of schedule and verification.

(*a*) Schedule of Forms, 3.

(*b*) Form 5.

(*c*) S. 34, Act of 1890. The chief clerk at Melbourne declined to accept a voluntary petition from a person who was an uncertificated insolvent; *In re*

*Antonio*, 8 A.L.T., 107.

(*d*) Form 4, r. 166.

(*e*) R. 166.

(*f*) *Vide* same and schedules, Form 4.

**CHAP. III.** as well by such other person or persons (*g*). The debtor must, besides inserting in the petition his name and description and his address at the date when the petition is presented, further describe himself as lately residing or carrying on business at the address or several addresses as the case may be at which he has incurred debts and liabilities, which at the date of the petition remain unpaid or unsatisfied (*h*).

Particulars may be dispensed with.

The judge or chief clerk may dispense with the whole or such portion of the particulars mentioned in the said schedule as he may think fit, but he cannot do so unless upon affidavit showing sufficient grounds (*i*), nor can he, in any case, dispense with the affidavit verifying the particulars of the schedule under r. 167

Directions as to order.

(*j*). Every order under this part of the Act must be either in print or manuscript or type-written, or partly in one and partly in another, on parchment or paper (*k*). Such a rule as this is directory merely (*l*).

Approximate or preliminary schedules.

On cause being shown, verified by affidavit, the practice is to allow an approximate or preliminary schedule to be filed containing the declaration, petition, balance-sheet and affidavit of verification, and allowing time according to the circumstances to file the complete schedule. R. 171, providing for allowance for further time for filing, applies to filing after adjudication of sequestration.

Chief clerk to telegraph chief clerk at Melbourne.

Upon any order of sequestration being made, the chief clerk must forthwith telegraph to the chief clerk of the Court at Melbourne that such order has been made (*m*). The chief clerk must forthwith forward a copy of every order of sequestration under Part III. of the Act of 1890 to the Registrar-General for registration (*n*). In a case where the term "forthwith" occurred in the phrase "the petitioning creditor shall forthwith take out the process of the Court" a delay of four days was considered a sufficient compliance (*o*), but if the term were necessarily the very foundation of the action it would apparently be otherwise (*p*). The party obtaining the order of sequestration must

Chief clerk to forward copy of order to Registrar-General.

(*g*) R. 167.

(*h*) R. 168.

(*i*) R. 169.

(*j*) *In re Antonio*, 8 A.L.T., 108.

(*k*) R. 172.

(*l*) *Vide In re Cutter and Lever*, 1 V.R.

(*l*), 13.

(*m*) R. 133.

(*n*) S. 20, Act of 1890.

(*o*) *In re Trevarrow*, 2 W. & W. (L.), 84.

(*p*) *Ibid*, 85.

forthwith lodge an office copy thereof with the Registrar-General, **CHAP. III.** and the name of the insolvent, his address and description, the date of the order of sequestration, and the name of the assignee or trustee named in the order, must be entered in a book kept by the Registrar-General for that purpose. Every entry must be numbered consecutively (q). Registration by Registrar-General.

The party obtaining any order of sequestration must forthwith lodge an office copy thereof with the sheriff, who must register the same and note thereon the day and hour of its production (r). The chief clerk, upon the request of the assignee or any creditor, and upon payment of the sum of five shillings, must telegraph to the sheriff notice that such order has been made (s). Registration of order by sheriff. Chief clerk may notify sheriff by telegraph.

If the insolvent die after the petition is presented, the proceedings, unless the Court otherwise orders, are continued as if he were alive (t). Where the debtor died two days after presenting his petition, it was held that the proper course for the Court to pursue in the absence of any arrangement on the part of the representatives of the deceased debtor was to make the order and allow the matter to proceed in the ordinary way (u). Continuation of proceedings on death of debtor.

The Supreme Court may, at any time, for sufficient reason, make an order staying the proceedings under an insolvency petition either altogether or for a limited time, on such terms and subject to such conditions as to it may seem just (v). Power to stay proceedings.

## 2.—PARTNERSHIP ESTATES.

A judge or the chief clerk upon the like petition stating the insolvency of the estate of any firm trading or having any estate or effects within Victoria, made by the greater number of partners of such firm who at the time of presenting the petition are within Victoria, may, upon proof thereof to his satisfaction, accept the surrender of any such estate and place the same under sequestration, and after the order for any such sequestration the like proceedings are had and take place concerning such estate and the Forma.

(q) R. 173.

(r) R. 174.

(s) R. 134.

(t) S. 103 (1), Act of 1897—compare *Bankruptcy Act* 1883, s. 108. By s. 130 of the Act of 1890, it was provided that if the insolvent died after sequestration, it proceeded after notice had

been given to such persons, if any, as the Court thought fit, as if the insolvent were living. Compare 32 & 33 Vict. c. 71, s. 80 (9); 12 & 13 Vict. c. 106, s. 116.

(u) *In re Walker*, 3 Morrell, 60.

(v) S. 108 (2), Act of 1897—compare *Bankruptcy Act* 1883, s. 109.

## CHAP. III.

Form of  
schedule.As to the  
petition.

partner or partners of such firm as are provided concerning other estates and other insolvents (*w*). The petition must contain the names in full of the individual partners, and if it is signed in the firm name it must be accompanied by an affidavit made by the partner who signs the petition showing that all the partners or the greater number of them within Victoria concur in the filing of the same (*x*). The partner signing the petition must add also to his own signature the words "a partner in the said firm" (*y*). The same form of schedule should be used as nearly as may be as in the case of an individual, and it should distinguish joint and separate estates and liabilities (*z*). Rule 168 applies, and also r. 169 giving power to the judge or chief clerk to dispense with particulars. As the petition is to be made by the greater number of the partners who are at the time presenting the petition within Victoria, one partner alone, although the only partner in Victoria, cannot sequester the estate of a firm, as one only is not a "majority" or a greater part (*a*). The order of sequestration in such a case was consequently set aside as a nullity (*b*).

Amending and  
setting aside  
order of  
sequestration.

Where there is only one partner alive it is equally clear that there cannot be the assent of the majority (*c*). In this case D. and W. were partners. D. died and W. carried on the business in the firm's name, and then presented a petition for the sequestration of the firm, alleging in the declaration "that my said firm admit that they are unable to pay their debts." This was not a compliance with s. 34 in the case of an insolvent filing, as the petitioner did not say that he was insolvent, nor was it within the terms of s. 35, for though he appeared to wish to sequester the estate of the firm, he showed that the only other partner in the firm no longer lived, and therefore he could not have obtained the assent of the greater number of partners of the firm. The order of sequestration was amended by striking out the firm's name and substituting that of W., the surviving partner (*d*).

(*w*) S. 35, Act of 1890.

(*x*) R. 287.

(*y*) *Vide* r. 285.

(*z*) R. 169.

(*a*) *Re Lister Henry*, 9 A.L.T., p. 57, referring to *In re Curley*, 5 A.J.R., 5; *Reg. v. Leech*, 5 V.L.R. (E.), 494; and *In re Fallu*, 3 V.L.R. (I.), 106.

(*b*) *Ibid*.

(*c*) *In re Dobson, Watson and Company*, 16 V.L.R., at p. 705.

(*d*) *Ibid*, 700; see also *Ex parte Hall, re Blackburn*, 1 De G., 332; *Ex parte Ashworth, re Hoare*, L.R. 18 Eq., 705.

The Court of Insolvency and the Full Court have power to set aside or amend an order of sequestration, but neither Court is under any obligation to exercise its power of setting aside a bad order of sequestration. It is in the discretion of either Court, and therefore, although the order for sequestration was bad on the ground that the petition was presented by one member only of a partnership consisting of two members, the Court, on appeal from the refusal of the judge of the Court of Insolvency to set aside the order, would not exercise its power of setting aside such bad order in the absence of special circumstances explaining the conduct of the other member and the reasons of his delay in making the application to set aside (*e*). In an application of this kind steps should be taken to give notice to all persons who might have claims against the applicant where he was a partner in the firm (*f*).

Under 5 Vict. No. 17, s. 4, on an application made by a creditor to set aside a voluntary sequestration by one partner only of a firm of two on the ground that it was not made on the petition of the greater number of the partners, it was held that the sequestration depends upon the antecedent consent of the partner not joining in the petition, and could not be supported by his subsequent approval, and the sequestration was set aside (*g*). Every person injuriously affected by an order of sequestration, for example, a creditor stopped by it, has a right to investigate its validity (*h*). Notice of the proceedings to set aside should be given to all the parties, including the party voluntarily sequestrating (*i*).

Who may question the validity of the sequestration.

When the estate of a partner in a firm is sequestrated, all his authorities to bind the firm by dealings in the ordinary course of business are deemed to be determined (*j*). S. 37 of the *Partnership Act* 1891 enacts that subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the insolvency of any partner.

Effect of insolvency of one or more partners in a firm.

A joint voluntary sequestration of a partnership estate operates

Effect on separate estates of sequestration by partners.

(*e*) *In re Myers v. Davies*, 17 V.L.R., p. 351. In this case a delay of thirteen years occurred in making the application.

(*f*) *Ibid.*

(*g*) *In re Yorston and Webster*, ex

parte *McEwan*, 1 W. & W. (L.), 96.

(*h*) *Ibid.*

(*i*) *Ibid.*

(*j*) *Thomason v. Frere*, 10 East, 418; 10 R.R., 341.

**CHAP. III.** as a sequestration of the separate estates of each (*k*), and therefore the joint sequestration of the joint estate of a firm is a sequestration of the separate estate of each partner (*l*). It is the same also in a compulsory sequestration of a firm (*m*). *Vide* also "Vesting of Joint and Separate Estates," Chapter V., Division 2, *post*.

### 3.—DISTRICTS IN WHICH PETITIONS PRESENTED.

All voluntary petitions must be presented to the judge or chief clerk of the district (*o*) in which the petitioner resides (*p*), or in the case of a firm to the judge or chief clerk of the Court of any district in which such firm has traded or carried on business (*q*) for the preceding six months or the longest period during such six months, and except as by the Act of 1890 otherwise provided, all proceedings under the sequestration are prosecuted in such district (*r*). An insolvent debtor or other person is deemed to reside in the district in which he has lived or carried on business during the six months immediately preceding the sequestration or for the longest period during such six months (*s*).

The petition must be presented to the judge or chief clerk of the district in which the insolvent resides (*t*). The jurisdiction of the judges, however, by an Order-in-Council (*u*), has been extended to the whole colony, the districts being respectively and collectively assigned to the judges (*v*). Where the proceedings have been commenced in the wrong district the judge may order the proceedings to be transferred to the proper district or that they be continued in the district in which they have been commenced, but until the transfer is made the proceedings are continued in the latter district (*w*). This rule does not apparently

(*k*) *Bates v. Loeve*, 1 W. & W. (E.), at p. 8; r. 238.

(*l*) *In re Turnbull*, 1 W. & W. (L.), 105, r. 288.

(*m*) R. 288.

(*o*) The districts conform to the bailiwicks, *ante* p. 16.

(*p*) The words "residence" and "business" have no actual definite technical meaning, but are construed in accordance with the object and intent of the Act in which they occur; *Ex parte Breull*, *In re Bowie*, 16 C.D., at p. 487. As to "carrying on business," *vide ibid* and *Graham v. Lewis*, 22 Q.B.D., 1.

(*q*) See note (*p*), *ante*.

(*r*) S. 36, Act of 1890. As to transfer of proceedings, *vide ante*, p. 13 *et seq*.

(*s*) S. 4, Act of 1890—compare 18 Vict. No. 11, s. 2, under which the jurisdiction was in the district where the debtor lived at the time of filing, though he might have just recently removed from another district (*In re Calhoun*, 2 W. & W. [L.], 81).

(*t*) *Reg. v. Poole*, 3 V.R. (L.), 181.

(*u*) *Government Gazette*, 13th July, 1888, at p. 2291.

(*v*) See Chapter I., at p. 16, and interpretation clause.

(*w*) R. 18.

apply to an order on a petition made by a chief clerk of the wrong district, as his duties are restricted to the one district (x). CHAP. III.

#### 4.—PERSONS WHO CAN VOLUNTARILY PETITION.

All debtors, including married women, aliens, and denizens and persons having privilege of Parliament, are capable of becoming insolvent, and are subject to all the provisions and entitled to the benefits of the Acts (y). Persons legally vested with the administration of the estate of any person deceased or with the estate of any other person situated in Victoria in trust for creditors may also voluntarily petition (z). An infant who has trade debts is not a debtor and cannot petition (a), but as infancy is no defence to an action on a contract for necessities for such debts there is apparently no difficulty as to voluntary sequestration (b).

#### 5.—DECEASED PERSONS' AND TRUST ESTATES.

Upon the petition of any person legally vested with the administration of the estate of any person deceased or with the estate of any other person situate in Victoria in trust for creditors stating the insolvency of such estate, a judge or chief clerk may, upon proof thereof to his satisfaction, accept the surrender of any such estate and place the same under sequestration, and after the order for any such sequestration the like proceedings take place concerning such estates and the persons in whom the administration thereof is legally vested as are provided by the Acts concerning other estates and other insolvents (c). The same form of schedule as in an individual estate as nearly as may be must be used (d). The vesting of the estate in the trustee gives him a right to sue the executors in respect of a *devastavit* committed by them prior to the sequestration of the testator's estate, and to recover the amount of such *devastavit* from them for the

Voluntary sequestration by persons vested with the administration of estate of others.

Form of schedule.

Right to sue executors for *devastavit*.

(x) *Reg. v. Poole*, ante; s. 10, Act of 1890.

(y) S. 19, Act of 1890; s. 119, Act of 1897.

(z) S. 35, Act of 1890.

(a) *Ex parte and re Jones*, 18 C.D., 109.

(b) *Vide* s. 19, Act of 1890; the nature of necessities is discussed in

*Johnstone v. Marks*, 19 Q.B.D., 509, dissenting from *Ryder v. Wombwell*, L.R. 3 Ex., 90, and approving of *Barnes v. Toye*, 13 Q.B.D., 410.

(c) S. 35, Act of 1890; s. 1, Act of 1897; and *vide McAuley v. Beatty*, 12 V.L.R., at p. 642.

(d) R. 169; *vide* rules 167 and 168 also.

**CHAP. III.** benefit of the creditors (*e*). Under the combined effect of ss. 35, 77, and 102, Act of 1890, a creditor of the deceased could not sue the executors (*f*).

Duties of executors, administrators and executors *de son tort* after filing.

After filing, certain duties in reference to supplying accounts of their transactions with and other particulars concerning the trust estate have to be discharged by the executors, administrators and executors *de son tort*, which are dealt with in rules 458 and 459, Appendix, *post*.

Administration by Supreme Court of deceased person's insolvent estate.

The assets of a deceased person whose estate may prove to be insufficient for the payment in full of the debts and liabilities may be administered by the Supreme Court, and the same rules prevail and are observed, (1) as to the respective rights of secured and unsecured creditors, (2) as to debts and liabilities provable, (3) as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the insolvency law with respect to the estates of persons placed under sequestration, and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person may come in under the decree or order for the administration of such estate and make such claims as they may be respectively entitled (*g*). The mode of procedure to obtain administration by the Supreme Court is set out in the *Supreme Court Judicature Rules* 1884, Order 55, rr. 3-12. The object of this provision is to make the rule in bankruptcy applicable to the administration of the assets of deceased persons. It is not intended to enlarge the assets of an insolvent estate, but only to vary the rights of the persons entitled to the assets (*h*). It does not apply all the principles of bankruptcy, and for example an unregistered bill of sale would not be invalid against the creditors (*i*). Neither is the retainer of the executors affected (*j*). The rule before the passing of this provision was that a secured creditor had a right to prove for the full amount of his debt against the estate and to obtain dividends from it without surrendering or valuing his securities, and after realizing on the

(*e*) *Hasker v. McMillan*, 5 V.L.R. (E.), 217.

(*f*) *Ibid.* Vide *McClelland v. Smith*, V.L.T., 150.

(*g*) *Supreme Court Act* 1890, s. 63 (1).

(*h*) *Re D'Epineuil, Tadman v. D'Epineuil*, 20 Ch. D., 217.

(*i*) *Re D'Epineuil, ibid.*

(*j*) *Lee v. Nuttall*, 12 C.D., 61. As to executors right of retainer in insolvency, see Chapter V., *post*.



security he paid over the surplus (*k*). The provisions of the Acts as to secured creditors are now applicable to it (*l*), and the provision has also been held to introduce the provisions of the Acts relating to debts provable (*m*), and also that of set off (*n*). On the other hand it does not affect the landlord's right to distrain (*o*), nor does it introduce the provisions of s. 76 as to the proceeds of a sheriff's sale passing to the estate in the event of insolvency of the debtor within four days (*p*). The provision also does not import the rule in insolvency giving local rates priority (*q*), nor the rule as to other preferential debts (*r*). The sections as to reputed ownership are likewise not imported (*s*), neither is the avoidance of voluntary settlements (*t*), nor the provisions as to fraudulent preference (*u*).

#### 6.—DECLARATIONS OF INABILITY TO PAY DEBTS.

A declaration by a debtor of his inability to pay his debts, duly dated, signed and witnessed according to the form in the schedule, with such variations as circumstances may require (Form II.), may be filed with the chief clerk of the Court in the district in which the debtor might present a petition for sequestration (*v*). The witness must be a solicitor, justice of the peace, or the chief clerk (*w*). The filing of such a declaration in prescribed form is an act of insolvency (*x*), and has been referred to as follows:—"This, I apprehend, meant, as a substitute for "voluntary sequestration, that a debtor filing such declaration "should enable any creditor who wished it to procure a compul-

(*k*) *Mason v. Bogg*, 2 My. & C., 443.

(*l*) *In re Withernsea Brick Works*, 16 C.D., 337. As to secured creditors, see "Proofs of Debt," Chapter V., Division 3, post.

(*m*) *Vide In re Northern Counties, &c., McFarlane's Claim*, 17 Ch. D., 337; *In re Bridges, Hill v. Bridges*, 17 Ch. D., 342.

(*n*) *Mersey Steel Company v. Naylor*, 9 A.C., 434; *Re Asphaltic Wood Pavement Company (Lee and Chapman's Case)*, 30 Ch. D., 216.

(*o*) *In re Coal Consumers' Association*, 4 C.D., 625; *Thomas v. Patent Lionite Company*, 17 C.D., 250.

(*p*) *Vide In re Withernsea Brick Works*, 16 C.D., 337, approving of *In re Richards and Company*, 11 C.D., 676.

(*q*) *In re Albion Steel and Wire Company*, 7 C.D., 547; *vide In re Maggi*,

*Winehouse v. Winehouse*, 20 Ch. D., at p. 550.

(*r*) *In re Maggi*, ante, commenting on *In re Norton Iron Works Company*, 26 W.R., 53; *In re Albion Steel and Wire Company*, ante; *Smith v. Morgan*, 5 C.P.D., 337.

(*s*) *In re Maggi*, ante; *In re Crumlin Viaduct Works Company*, 11 C.D., 755; *Gorringe v. Irwell, &c., Works*, 34 C.D., 128; *In re Stockton Iron, &c., Co.*, 10 C.D., 335; *Re Withernsea Brick Works*, 16 C.D., at p. 341.

(*t*) *Re Gould*, 19 Q.B.D., 92.

(*u*) *Re Withernsea Brick Works*, 16 C.D., at p. 341.

(*v*) R. 165—compare r. 16, *Bankruptcy Act 1869*; r. 135, *Bankruptcy Rules 1886*.

(*w*) *Ibid*.

(*x*) S. 37 (4), Act of 1890.

**CHAP. III.** "sory sequestration" (*y*). Where a firm of debtors file a declaration the same must contain the names in full of the individual partners, and if such declaration is signed in the firm name the declaration must be accompanied by an affidavit made by the partner who signs the declaration showing that all the partners or the greater number of partners within Victoria concur in the filing of the same (*z*). The partner signing for the firm must add also his own signature (*a*).

(*y*) *Per* Molesworth, J., *Re Smith*,  
3 A.J.R., 17.

(*z*) R. 287.

(*a*) *Vide* r. 285.

## CHAPTER IV.

### COMPULSORY SEQUESTRATIONS.

- |   |  |
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#### 1.—QUALIFICATION OF PETITIONER AND GROUNDS FOR COMPULSORY SEQUESTRATION OF ESTATES.

A SINGLE creditor, or two or more creditors if the debt due to such single creditor or the aggregate amount of debts due to such Qualification of petitioner. several creditors from any debtor amount to a sum not less than fifty pounds, may present a petition to a judge of the Supreme Court or of the Court praying that the estate of the debtor may be sequestrated for the benefit of his creditors, and alleging as the ground for such petition any one or more of the acts or defaults which are described as acts of insolvency, set out in s. 37, Act of 1890 (*a*), which are dealt with in sub-heading 7 of this chapter.

No person can be adjudged an insolvent on any of the said Limitation as to time. grounds unless the act of insolvency on which the adjudication is granted has occurred within six months before the presentation

(a) Compare 32 & 33 Vict. c. 71, s. 6.

CHAP. IV. of the petition for sequestration (*b*). The day on which the petition is presented is not counted (*c*). A month means a calendar month unless words be added showing a lunar month is intended (*d*).

There is also one other act of insolvency contemplated by the Act of 1890 as follows:—

Act of insolvency under s. 50, Act of 1890.

If a person against whom an order *nisi* for sequestration has been made pay any money to the person who obtained the same or anyone on his behalf, or give or deliver to any such person any satisfaction or security for his debt or any part thereof, such payment, gift, delivery, satisfaction, or security is an act of insolvency upon which a petition for sequestration may be presented (*e*).

And in the cases following the Court of Insolvency may sequester an estate:—

Sequestration under ss. 153 and 154, Act of 1890.

(I.) If it appear to the Court that a liquidation by arrangement cannot proceed as set out and from the causes set out in s. 153, sub-s. 13, Act of 1890, the Court may, on the petition of the trustee or of any creditor whose debt amounts to £50 and upwards, sequester the property of the debtor (*f*).

(II.) If it appear to the Court that the composition cannot, or ought not to proceed as set out, and from the causes set out in s. 154 of the Act of 1890, the Court may sequester the property of the debtor (*g*).

Sequestration under r. 420.

(III.) If it appear to the Court on the petition (*h*) of any creditor whose debt amounts to £50 or upwards that such creditor had no notice of the meeting at which liquidation by arrangement of the affairs of a debtor was agreed upon and that he dissents from the liquidation, and that his vote would have altered the result arrived at by such meeting, r. 420 provides that the Court may make an order sequestering the estate. Every such petition must be heard upon affidavit and must be presented within thirty days from the date of the meeting at which the liquidation by arrangement was agreed upon (*i*).

Sequestration under s. 131, Act of 1890.

(IV.) If it appear to the Court that the composition under s. 131, Act of 1890, cannot proceed without injustice or undue delay, or if at any time default is made in payment of any instalment due in pursuance of the composition, or it appears that the order for release was obtained by fraud, the Court may annul the composition and release and may sequester the debtor's estate, as provided by s. 14 (2), Act of 1897 (*k*).

(*b*) S. 37, Act of 1890.

(*c*) *Re Hanson, ex parte Forster*, 4 Morrell, 98.

(*d*) Act 1058.

(*e*) S. 50, Act of 1890, *vide post*, sub-division 13 of this chapter.

(*f*) S. 153 (13), Act of 1890.

(*g*) S. 154, *ibid.*

(*h*) Form 162, *post*.

(*i*) R. 420.

(*k*) *Vide* Chapter VIII. hereof, *post*.

2.—JUDICIAL DISCRETION AS TO COMPULSORY SEQUESTRATION. CHAP. IV.

The mere existence of the materials on which an order might be made does not deprive the Court of a discretion to refuse an order (*l*).

The main object with which the creditor proceeds must be that of having the assets of the debtor distributed amongst his creditors, and if he is proceeding mainly with that object it is immaterial that he has or had some ulterior motive. But when the real object and true purpose and intention of the creditor is not to distribute the assets and is not to get his debt paid, then it is an abuse of the Court to allow such proceedings to be taken (*m*); as where the petitioning creditors were assisting another person in a dispute with the respondent (*n*), or where the object was to work a dissolution of partnership (*o*), or to put an end to an action (*p*). It has, however, recently been held by the Privy Council that mere motive of the petitioner, however reprehensible, does not affect the validity of the proceedings or make them an abuse of the process of the Court, unless it be shown that the remedy would be unsuitable and would enable the person obtaining it to fraudulently defeat the rights of others (*q*). It is not a sufficient ground for refusing the petition that apparently the debtor has no assets available for distribution amongst his creditors (*r*), if from the position of the debtor property may be acquired towards satisfaction of the respondent's creditors before he obtains his discharge (*s*); but the Court will not make an order if satisfied that there are no assets and no reasonable prospect of assets coming into existence and that the order will only result in heaping up of costs (*t*). The fact that

(*l*) *In re Sims, ex parte Demamiel*, 21 V.L.R., at p. 633; 17 A.L.T., 230; 2 A.L.R., 20.

(*m*) *In re Smart and Walker, ex parte Hill*, 20 V.L.R., 97.

(*n*) *Ibid. Vide Ex parte Griffin, re Adams*, 12 C.D., 480.

(*o*) *In re and ex parte Browne*, 1 Rose, 151; *Ex parte and re Johnson*, 2 M.D. & D., 678; *Ex parte Phipps, re Jukes*, 3 M.D. & D., 505; *vide also Ex parte Harcourt*, 2 Rose, 203, 214.

(*p*) *Ex parte and re Bourne*, 2 G. & J., 137.

(*q*) *King v. Henderson* (1898), A.C., 720, approving *Ex parte Wilbran*, 5 Madd. 1, and distinguishing *Lister v.*

*Perryman*, 39 L.J. Ex., 177; L.R. 4, H.L., 521; *vide also In re Morrissey, ex parte Perkins*, 20 A.L.T., 223.

(*r*) *In re and ex parte Leonard*, (1896) 1 Q.B., 473; and *vide Ex parte and re Painter*, (1895) 1 Q.B., at p. 91.

(*s*) *In re Cristobal Murrieta, ex parte South American, &c., Ltd.*, 3 Manson, 35.

(*t*) *In re and ex parte Belts*, (1897) 1 Q.B., 50; 3 Manson, 287. This case is distinguished in *Re Jubb, ex parte Burman and Greenwood*, (1897) 1 Q.B., 641; *vide also Re Somers, ex parte Union Credit Bank, Ltd.*, 4 Manson, 227.

**CHAP. IV.** the respondent has no other creditor than the petitioner is not a conclusive reason for dismissing the petition (*u*). When the effect of the bankruptcy would be to put an end to the only asset out of which the debtor can pay any creditors, such as a life interest determinable on bankruptcy, there is sufficient cause to dismiss the petition (*v*). There must be other evidence than the debtor's own affidavit (*w*). It was also held a sufficient cause for dismissing a petition that the real object of the creditor was not to obtain an adjudication but to extort money from the debtor (*x*), and in one case the decision was adjourned to prevent the insolvency defeating an appeal by the debtor against the proceedings instituted by the creditor, the latter having obtained security for the costs of such appeal (*y*).

### 3.—WHO MAY PETITION.

Ordinary  
creditors.

Duly authorised  
agent.

Power to change  
carriage of  
proceedings.

A single creditor whose debt amounts to a sum not less than fifty pounds, or two or more creditors the aggregate amount of whose debts amount to fifty pounds, may petition (*z*). The duly authorised agent of any creditor, whether a corporation or not, can petition (*a*). When the petition is presented signed by an agent, the authority of such agent must be proved (*b*). If the petitioner does not proceed with due diligence, the Supreme Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the statutory amount (*c*). The power of substituting new petitioners cannot be exercised after the expiration of the statutory period for presenting a petition, unless perhaps fraud is alleged, as otherwise the effect would be to extend the time for filing petitions (*d*).

Municipal  
Corporation.

A debtor can be made insolvent on the petition of a municipal corporation (*e*). A registered company petitions in its corporate

(*u*) *In re and ex parte Hecquard*, 24 Q.B.D., 71.

(*v*) *In re and ex parte Otway*, (1895) 1 Q.B., 812; 2 Manson, 174. *Vide also In re and ex parte Robinson*, 22 C.D., 818; *In re Birkin*, 3 Manson, 291.

(*w*) *In re Birkin*, ante.

(*x*) *In re and ex parte Otway*, ante; *Re Davies, ex parte King*, 3 C.D., 461.

(*y*) *In re Sims, ex parte Demamiel*, 21 V.L.R., 630; 17 A.L.T., 230; 2 A.L.R., 20. See also the observations made in *Ex parte and in re Brigstocke*, 4 Ch. D., at pp. 351 et seq.

(*z*) S. 37, Act of 1890.

(*a*) S. 21, *ibid*.

(*b*) *Vide In re Jenkins*, 15 V.L.R., at p. 272.

(*c*) S. 107, Act of 1897—compare *Bankruptcy Act 1883*, s. 107.

(*d*) *In re and ex parte Maughan*, 21 Q.B.D., at p. 23; *vide also In re and ex parte Maund* (1895), 1 Q.B., at p. 198.

(*e*) *In re Pitson, ex parte President, &c., Shire of Huntly*, 16 A.L.T., 9; and *vide Local Government Act 1890*, s. 9.

name, and a company or co-partnership authorised to sue or be sued in the name of a public officer, may, through such officer, petition (*f*). In the case of a registered company petitioning, if the petition has the common seal attached it is a sufficient signature (*g*). CHAP. IV.  
Company.

With the sanction of the Supreme Court the official liquidator can petition as to ordinary debts in the name and on behalf of the company (*h*), and he may apparently present a petition against a contributory for a call due under the effect of ss. 72 and 90 of the *Companies Act* 1890, with the sanction of the Court. A liquidator under a voluntary liquidation may without the sanction of the Court exercise all powers given by Part I. of the *Companies Act* 1890 to the official liquidator (*j*). The petition must be in the name of the company (*k*). Liquidator as to  
ordinary debts.  
  
Liquidator as to  
contributories.

The liquidator of a mining company, registered under Part II. of the *Companies Act* 1890, has also general powers under s. 291 of that Act. In any contemplated petition against a contributory by a liquidator of a mining company so registered, regard should be paid to ss. 239, 241, 249 and 281 of that Act (*l*). Liquidator of  
mining  
companies.

The assignee of a judgment creditor who has brought himself within the provisions of the *Supreme Court Act* 1890, can petition (*m*) and an equitable assignee can present a petition without joining the assignee, since s. 37, Act of 1890, provides that the debt may be due at law or in equity (*n*). Assignees of a  
creditor.

Under the English Acts an executor may petition in respect of a debt due to the testator, though he has not obtained probate (*o*), if it is subsequently obtained before adjudication (*p*); but here the procedure is different, inasmuch as the petitioner's position as a creditor must be proved to the judge's satisfaction before the order *nisi* is granted and not only at the hearing, and it would therefore appear that probate must be granted before the Executor.

(*f*) R. 284.

(*g*) *In re Jenkins*, ante; vide also "Petition," post.

(*h*) *Companies Act* 1890, s. 90.

(*j*) *Companies Act* 1890, s. 119 (7).

(*k*) *Re Bassett*, ex parte *Lewis*, 2 Mans. 177; vide also *Re Shirley*, ex parte *MacKay*, 58 L.T., 237.

(*l*) *Vide King's Birthday Q.G.M. Company v. Jack*, 11 V.L.R., 197.

(*m*) *In re Premier, &c., Association*,

ex parte *Stewart*, 16 V.L.R., 20; vide also *In re Smith*, 3 A.J.R., 18; vide also *In re Morrissey*, ex parte *Perkins*, 20 A.L.T., 223.

(*n*) *Vide Ex parte Cooper*, re *Baillie*, 32 L.T. N.S., 780.

(*o*) *Ex parte Paddy*, re *Drakely*, Buck, 235, referring to *Rogers v. James*, 2 Marsh, 425.

(*p*) *Ibid*.

**CHAP. IV.** In the case of an infant the petition should be by a next friend. Where an infant issues a debtor's summons, the debtor, if he asks for it, is entitled to have some adult person named as security for costs, but if no application is made and the summons proceeds an adjudication of bankruptcy is valid (*m*).

**Infants.** On a cause of action arising after the insolvency it has been held that an uncertificated insolvent can sue so long as the assignee does not interfere, as he is the agent of the assignee (*n*), and it was also considered that an uncertificated bankrupt could petition if the assignee made no claim to the debt (*o*).

**Uncertificated insolvent.** Where there is a contract as specified in s. 6 of the *Partnership Act* 1891, a person lending to another engaged in business or about to engage in any business in consideration of a share of profits, and a person selling the goodwill of a business in consideration of receiving a portion of the profits, can petition, but their rights are postponed until the claims of the other creditors of the borrower or buyer have been satisfied (*p*). Aliens and denizens are subject to all the provisions of the Acts, and are entitled to the benefits given by them (*q*).

**Person lending or selling in consideration of share of profits.** A creditor who concurs in the act of insolvency as by consenting to a deed of assignment for the benefit of creditors generally is estopped from presenting a petition on such (*r*), but he is not so estopped if he neither assents nor dissents (*s*).

**As to creditors concurring in act of insolvency.** On the death of the petitioning creditor after the issuing of the proceedings, the same have been allowed to be carried on by the executors, and the adjudication made (*t*).

#### 4.—DEBTORS SUBJECT TO THE ACTS.

**Generally.** All debtors are liable to be made insolvent (*u*). "Debtor"

(*m*) *Ex parte and in re Brocklebank*, 6 Ch. D., 358.

(*n*) *Madden v. Hetherington*, 3 V.R. (L.), 68; *Fancy v. The North Hurdfield United Company*, 8 V.L.R. (M), 5.

(*o*) *Ex parte Cartwright, in re Whitehouse*, 2 Rose, p. 230.

(*p*) *Partnership Act* 1891, s. 7; and see also *Ex parte Jones, in re Butchart*, 2 W.W. & a'B. (L.), 8; *In re Hildeheim*, (1893) 2 Q.B., 357.

(*q*) S. 19, Act of 1890; s. 1, Act of

1897.

(*r*) *In re Vail*, 1 V.L.R. (L.), 5, overruling *Re Eastwood*, 5 A.J.R., 61. *Vide* also notes to Act of Insolvency under s. 37, Act of 1890, Act 1, *post*.

(*s*) *In re Wiedeman*, 5 V.L.R. (L.), 32.

(*t*) *Ex parte Tanner, re Parker*, 1 Mont. & McA., 292. S.C., *Ex parte Winwood, re Parker*, 1 G. & J., 252.

(*u*) S. 19, *ante*.



includes joint debtors, whether partners or not, and includes the plural (*v*). CHAP. IV.

Aliens and denizens are included (*w*), and it apparently makes no difference if the debt is contracted abroad if he is in the jurisdiction (*x*); but a foreigner who is not in the colony cannot be made insolvent unless the act of insolvency is committed in the colony (*y*). Persons having privilege of Parliament are also liable to be made insolvent (*w*). A convict is liable to pay his debts, and on an act of insolvency committed by him he may be adjudicated an insolvent (*z*).

Aliens and denizens.

Persons having privilege of Parliament.

Convicts.

Married women are subject to the Insolvency Acts (*a*). Prior to the Act of 1897, where the act of insolvency was under sub-s. 8, sec. 37, Act of 1890, the judgment recovered against a married woman was held to be *prima facie* evidence that she had separate property, and it was not necessary to allege in the petition that she had (*b*). As to the husband's liability for the debt of his wife contracted before marriage, and for contracts entered into by her and wrongs committed by her before marriage, *vide* ss. 17 and 18, Act No. 1116.

Married women.

Husband as to wife's ante-nuptial liabilities.

Where the act of insolvency was upon sec. 37 (5), Act of 1890, the estate of a lunatic was sequestrated (*c*). The objection was taken in this case that a lunatic could not be made insolvent, but no reference was made to the point in the judgment, the learned judge apparently acquiescing in the statement of counsel that there was nothing to show that the alleged lunatic was not quite sane in matters of business (*d*). The act of insolvency under

Lunatics.

(*v*) *In re Thomas and Cowie*, 9 V.L.R. (I.), 2. *Acts Interpretation Act* 1890, s. 5.

(*w*) S. 19, *ante*.

(*x*) *Vide Ex parte Pascal*, in *re Meyer*, 1 Ch. D., at p. 512.

(*y*) *Re Pearson*, (1892) 2 Q.B., 263; *Ex parte Blain, re Sawers*, 12 C.D., 522; *Ex parte Crispin*, L.R. 8 Ch., 374.

(*z*) *Ex parte Graves, re Harris*, 19 C.D., 1. *Vide Crimes Act* 1890, s. 549, *et seq.*

(*a*) S. 119, Act of 1897.

(*b*) *In re Willison*, 4 V.L.R. (I), 67. A form of judgment as to separate estate against a married woman is given in *Scott v. Morley*, 20 Q.B.D., at p. 132. *Vide Colonial Bank of Australasia v. Kerr*, 15 V.L.R., at p. 80; and

*vide also Sheppard v. Penglase*, 18 V.L.R., at p. 189. In an earlier case it was decided that where the judgment debt was recovered against a husband and wife, and a writ of *feri facias* issued against the estate of them or either of them, the wife, having separate property, committed an act of insolvency in not satisfying the debt, although the writ was not expressed to be issued against her separate estate. *In re Isaacs*, 1 V.L.R. (I.), 1. The Act in force as to married women then was that of 1871, which differed materially from the Act now in force.

(*c*) *In re Bayldon*, 2 V.L.R. (I.), 85.

(*d*) *Vide* judgment in *Re Opitz*, 18 V.L.R., 35, *ante*.

CHAP. IV. the sub-section referred to does not necessarily depend upon any act of the debtor or upon his volition or state of mind ; but where the petition is based on sub-s. 8 the proviso to that sub-section makes a most material difference. The proviso requires that the debtor must be called upon to satisfy the judgment and fail to do so. This cannot apply to a lunatic, unless in a lucid interval, as so much depends on the respondent's acts (*e*). It is considered, according to an English decision, to be an "open" question as to whether a lunatic can be adjudicated a bankrupt (*f*). The doubt is of very long standing and there is no direct decision on it (*g*), but it appears that a lunatic can be adjudicated a bankrupt under the direction of his committee acting with the consent of the Court in Lunacy (*h*).

Infant.

As an infant can contract for necessities it may be assumed that his estate may be sequestrated in respect to such a debt (*i*) ; and as infancy is no defence to an action of tort, a judgment debt in such a case might be held a good petitioning debt (*j*) ; but an infant cannot be adjudicated a bankrupt on the petition of a person who has supplied him with goods on credit for trade purposes, and to whom he has made no express representation that he is of full age even though he has previously filed a liquidation petition the proceedings under which have become abortive ; but whether if the infant had expressly represented to the petitioning creditor that he was of full age adjudication could be made was queried (*k*). But it has been held, without attempting to define the exact character of the liability, or the legal language in which it ought to be described, that if an infant, by fraudulently misrepresenting that he was of age, induced a person to enter into a contract with him under which materials were supplied and work done, such person could maintain an action against such infant to obtain a return of the materials in the possession of the infant, and an account and payment of the value of so much of such materials as were no longer in his control and disposition (*l*), and in the

(*e*) *Ibid.*

(*f*) *In re Farnham*, (1895) 2 Ch. 799, at p. 809.

(*g*) *Ibid.*, at pp. 806 and 809.

(*h*) *Ibid.*, 799.

(*i*) See note to *Ex parte Jones*, *infra*, and s. 19.

(*j*) *Vide* Addison on Torts, 7th Ed. at p. 120.

(*k*) *Ex parte and in re Jones*, 18 Ch. D., 109 ; Jessell, M.R., in his judgment in this case says, "How is it made out that he is a debtor? There is no common law liability because an infant could not contract a debt except for necessities."

(*l*) *Campbell v. Ridgley*, 13 V.L.R., 701. In this case cases showing that

event of an infant being made insolvent for a debt contracted under a false representation that he was of age, such is a ground for refusing to annul the sequestration on the infant's application (*m*). In the present state of the Victorian law, the *Infants Relief Act* 1874 not having been introduced, a debt incurred by an infant is voidable and not void, and therefore ratification of it in writing duly signed after full age (*n*) would support a petition.

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A receiving order cannot be made against a firm if one of the partners is an infant although judgment has been obtained against the firm in the name of the firm and a bankruptcy notice in respect of that judgment has been served upon the firm (*o*). On appeal to the House of Lords the judgment in the case cited was amended (as the same could not be recovered against a firm with an infant partner) by excepting the infant member; and the bankruptcy proceedings were likewise amended so that the receiving order might be made against the firm other than the infant partner (*p*).

Infant partner  
in a firm.

On petition for a second sequestration against an uncertificated insolvent it was held that there was nothing to prevent the order absolute being made, and it was made accordingly (*q*).

Uncertificated  
insolvent.

Any creditor whose debt is sufficient to entitle him to present a petition against all the partners of a firm may present a petition against any one or more partners of the firm without including the others (*r*). Where there are more respondents than one the Supreme Court may discharge such order as to one or more of them without prejudice to the effect of the petition as to the other or others of them (*s*).

Partners.

The provisions of s. 37, Act of 1890, apply to partners and

Under s. 37, Act  
of 1890.

in Equity the liability of an infant for fraud is the same as the liability of an adult were cited.

(*m*) *Vide Ex parte and in re Bates*, 2 M.D. & D., 337.

(*n*) *Vide Instruments Act* 1890, s. 215.

(*o*) *In re and ex parte Beauchamp*, (1894) 1 Q.B., 1; 10 Morrell, 277.

(*p*) *Lovell v. Beauchamp*, (1894) A.C., 607. The amendment was made under s. 105 of the English Act as follows:—"The Court may at any

"time amend any written process or "proceeding under this Act upon such "terms (if any), as it may think fit to "impose." See Chapter II., at p. 45.

(*q*) *Re Love*, 5 A.J.R., 157; and see also, *Ex parte Watson, in re Roberts*, 12 C.D., 380.

(*r*) S. 109, Act of 1897—compare s. 110, *Bankruptcy Act* 1883; *vide infra* as to sequestration of estates under s. 41, Act of 1890.

(*s*) S. 110, Act of 1897.

CHAP. IV. joint debtors (*t*). Under the provision referred to the act of insolvency must necessarily be committed by all the partners if it is sought to sequester the firm's estate, as in the case of an execution of a deed of assignment or the failure of each partner to satisfy an execution (*u*).

Under s. 41, Act of 1890.

Under s. 41, Act of 1890, a creditor is enabled to have the estate of a firm placed under sequestration if any one or more of the partners have committed an act of insolvency whereby the creditors of such firm may be defeated or delayed in obtaining payment of the debt due by such firm (*v*). In such a case any creditor of the firm may petition against all or any one or more of the partners of such firm (*w*). Every order of sequestration issued upon such a petition is valid although it does not include all the partners of the firm, and after the order for sequestration of any such estate is made the like proceedings take place concerning such estate and such partner or partners as are provided to be had and take place concerning other estates and other insolvents (*x*). Nothing, however, contained in such section extends, or can be construed, to prevent the creditor of any firm from proceeding against any partner or the separate estate of any partner thereof in respect of debts due by such firm in the same way in which it is therein provided that the creditor of any person may proceed against him and his estate in respect of debts due by such person in his individual capacity (*y*). S. 41 has been judicially commented on as follows:—"It is an enabling, not a "disabling section. It is not intended to prohibit the sequestration "of a firm's estate in all cases but those in which the act of insolvency may have the effect of defeating or delaying the firm's "creditors. But whenever any one of the partners has committed "an act of insolvency which may have the effect of defeating or "delaying creditors the estate of a firm may be sequestered" (*z*). And again, "the intention to defeat or delay the creditors appears "to be an essential ingredient in the act of insolvency necessary" (*a*). A failure to satisfy a judgment for instance does not neces-

Nature of act of insolvency required under s. 41.

(*t*) *Vide In re Thomas and Cowie*, 9 V.L.R. (I.), 2.

(*u*) *Ibid* and *Re De Beer Monte and Company*, 16 A.L.T., 160.

(*v*) *In re Martin*, 4 W.W. & a'B. (I.), 4.

(*w*) S. 41, Act of 1890.

(*x*) *Ibid*.

(*y*) *Ibid*.

(*z*) *In re Thomas and Cowie*, 9 V.L.R. (I.), 2; *per Holroyd, J.*, p. 11.

(*a*) *Per Molesworth, J.*, *In re Martin*, 5 V.L.R. (I.), at p. 15.

sarily operate to defeat or delay creditors, and it is not available as an act of insolvency under s. 41 (b). The creditor may sequester the estate of one partner under s. 41 without being bound to make the firm insolvent, although he may do so if he please (c). As to the effect of the order on the separate estates the judgment of the Full Court in *Thomas and Cowie* (d) states:—"Mr. Justice Chapman (e), was of opinion that an order under this section "would operate to sequester not only the joint estate of the firm, "but likewise the separate estates of all the partners included in "the order, although not of absent partners, i.e., partners not "served with the petition, and who had not an opportunity of "opposing it. The effect of such an order on the separate estates "of the partners included in it may still be debatable" (f). By r. 288 it is provided that an order of sequestration under Part IV, Act of 1890, made against a firm "shall operate as if it were an "order made against each of the persons who at the date of the "order is a partner in that firm." An order made under s. 37, sequestering the separate estates of all the partners in a firm, also sequesters their joint estates, and an order under the same section for the sequestration of a firm includes the separate estates of all the partners, for no sequestration under such section could place the distribution of the joint estate in the hands of the assignee unless the petition was presented against all the partners and each was proved to have committed an act of insolvency (g).

CHAP. IV.  
As to separate estates.

Effect of order under s. 37.

As to infant member of a firm, see "Infant," *ante*.

Infant member.

A convict is liable to pay his debts, and may commit an act of insolvency (h).

Convicts.

### 5.—DECEASED PERSONS' ESTATES.

Any creditor or creditors of the estate of any deceased person whose debt or debts would have been sufficient to support a petition for sequestration against such deceased person had he

Sequestration of estate of deceased person.

- (b) *In re Martin*, *ante*.
- (c) *In re Drysdale*, 3 W.W. & A.B. (I.), 30.
- (d) 9 V.L.R. (I.), 12.
- (e) *Re Turnbull*, 1 W. & W. (I.), 105.
- (f) *Bates v. Loewe*, 1 W. & W. (E.), 7.
- (g) *In re Thomas and Cowie*, 9 V.L.R. (I.), at p. 10. The judgment in this case adds:—"Lord Eldon condemned the "practice of taking out several com-

"missions against the partners when a "firm was bankrupt, and settled the "proper course of procedure to be to "obtain a joint commission (*Ex parte Gardiner*, 1 V. & B., 74), and that "course has ever since been followed "during the subsequent changes after "fats were substituted for commis- "sions and adjudications for fats." (h) *Ex parte Graves, re Harris*, 19 C.D., 1. *Vide Crimes Act 1890*.

**CHAP. IV.** been alive, may, in manner provided by the Insolvency Acts, petition to have the estate of such deceased person placed under sequestration as insolvent (*i*). A form of petition is given in Form No. 15, *post*. Upon such petition and upon proof that the estate is insufficient to pay its debts, or that the creditors of such estate may be defeated, hindered or delayed in obtaining payment of the debts due by such estate unless such estate is sequestered, an order for sequestration thereof may be made, and thereupon the like proceedings take place concerning such estate and its representatives as are provided to be had and take place concerning other estates and other insolvents (*j*). The Court has the like discretion in the case of a petition of this nature as it has in making an order against a living debtor (*k*). The words "may in manner provided by the Insolvency Acts petition" indicate the manner only and provide the procedure for sequestering the estate of a deceased person (*l*). The petition must contain or refer to proof that the estate is insufficient to pay its debts, and this is sufficient to support it, and is the substitution for an act of insolvency, and therefore an act of insolvency need not be alleged or proved (*m*).

Form of petition.

Discretion of Court.

Contents of petition and procedure.

As to voluntary settlements and fraudulent preferences executed prior to decease.

It has been held under the analogous sections of the *Bankruptcy Act* 1883, that the sections avoiding voluntary settlements and fraudulent preferences do not apply to the administration of the estate of a deceased person in insolvency (*n*).

Funeral and testamentary expenses preferential debts.

Any claim by the representative of the deceased person to payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate is deemed a preferential debt, and is payable in full out of the estate in priority to all other debts (*o*), and any surplus remaining in the hands of the

(*i*) S. 113 (1), Act of 1897—compare *Bankruptcy Act* 1883, s. 125.

(*j*) *Ibid* (2). S. 42, Act of 1890, not expressly repealed, contains the provision that "the person in whom the administration of such estate is legally invested has committed an act of insolvency whereby the creditors of such estate may be defeated or delayed in obtaining payment of the debts due by such estate," and *vide* thereon *In re Cohen*, 15 V.L.R., 667; *Re Carey*, 13 V.L.R., 161.

(*k*) *In re Outram*, *ex parte Ashworth*, 63 L.J.Q.B., 309. *Vide* p. 83 hereof.

(*l*) *In re Fergie*, 24 V.L.R., 416; 20 A.L.T., 171.

(*m*) *Ibid*.

(*n*) *Ex parte Official Receiver*, in *re Gould*, 19 Q.B.D., 92.

(*o*) S. 113 (3), Act of 1897—compare *Bankruptcy Act* 1883, s. 125, (7), under which where an action for administration of an insolvent estate had been transferred to Bankruptcy, the Court, allowed the costs of the parties to the action, taxed as between solicitor and client, to be paid out of the assets as "testamentary expenses." *In re Chapman*, *ex parte Clarke*, 1 Manson, 413.

trustee after payment in full of all debts due by the estate together with the costs of the administration and interest as provided by the Insolvency Acts is paid over to the representatives of the estate or dealt with in such other manner as may be prescribed or as the Court may direct (*p*). CHAP. IV.

Surplus of estate.

The order *nisi*, unless the judge otherwise directs, must be served on each executor who has proved the will or, as the case may be, on each administrator (*q*). The judge may also order, if he thinks fit, the order *nisi* to be served on any other person (*r*).

Service of order nisi on legal representatives.

After the order of adjudication of sequestration is made certain duties in reference to supplying accounts of their transactions with and other particulars concerning the trust estate have to be discharged by executors, administrators and executors *de son tort*, which are dealt with in rr. 458 and 459, *post*.

Duties of executors, administrators, and executors *de son tort* after sequestration.

The executor's right to retain a debt due to himself is not affected by s. 113, Act of 1897 (adapted from s. 125, *Bankruptcy Act* 1883), when such right has been exercised before the order *nisi* is granted (*s*); and when the debt exceeds the amount of the testator's assets the executor is not bound to convert them into money before exercising his right of retainer, but he may retain the assets in specie in satisfaction of the debt (*t*).

Executor's right of retainer.

## 6.—THE PETITION.

The petition may be presented to a judge of the Supreme Court or of the Insolvency Court (*u*). It must set out the names of the petitioning creditors (*v*), the debtor's name, the amount of the debt and the cause thereof, the alleged act of insolvency, and a prayer for sequestration of the debtor's estate for the benefit of his creditors (*w*). Where the petition showed that the debt was due to two of three partners petitioning, and no

Presentation.

Contents.

(*p*) S. 113 (4), Act of 1897.

(*q*) R. 170 (3).

(*r*) *Ibid*.

(*s*) *Vide In re Williams, ex parte Lewis*, 8 Morrell, 65.

(*t*) *In re Gilbert*, (1898) 1 Q.B., 282; 4 Manson, 337.

(*u*) S. 37, Act of 1890. In the case of *Re McConville*, 7 V.L.R. (I.), 17, it was held that there was no jurisdiction to make the order *nisi* unless the petition was addressed to a judge. The section however says "presented," not

"addressed," and when the petition omitted the judge's name but the order *nisi* stated that "the petition was presented to one of the judges of the Supreme Court," and such order *nisi* was signed by the judge, the objection that the petition was not duly presented was unsustainable. *In re Pedler*, unreported, Oct. 11th, 1894, before Williams, J.

(*v*) In the case of a firm, see s. 13, Act of 1897.

(*w*) S. 39, Act of 1890.

CHAP. IV. explanatory statement was inserted in the petition, the order nisi was discharged (x), but where the judgment was obtained in the firm's name, and the petition was by A. and B. trading as the firm, the Court after the close of the petitioner's case allowed evidence to be given to show their identification (y). Where the petition is presented by a liquidator of a company in liquidation it should be in the name of the company and headed accordingly (z). The debtor's names must be set out, and in the case of a firm the firm's name is sufficient (a), and a creditor who may present a petition against all the members of a firm may present it against any one or more of the partners of a firm without including the others (b).

The debt.

The debt by English authority should be one that exists at the time the act of bankruptcy is committed, and a subsequent creditor it has been held cannot take advantage of such act of bankruptcy (c). It is important to point out that it was indicated in *Re Smith*, 7 V.L.R. (I.), at p. 6, that it was not necessary that the debt should so exist. The debt, if in existence, need not be due to the petitioning creditor himself at the date of the act of insolvency (d).

Liquidated sum.

The debt and its nature must be set out in the petition (e). The debt must be a liquidated sum due at law or in equity (f), payable immediately or at some certain future time (g). The word "liquidated" is used in distinction from "damages," e.g., for goods sold and delivered (h). Under the Act of 1890 it was held that the debt must be presently payable, and that a promissory note not due was not a good petitioning creditor's debt (i)

(x) *In re Fraser*, 6 V.L.R. (I.), 20.

(y) *In re Douglas*, 12 V.L.R., 265; see also *In re Vagg*, 13 V.L.R., at p. 176.

(z) *Companies Act* 1890, ss. 90, 119; *In re Bassett, ex parte Lewis*, 2 Manson, 177; and vide *In re and ex parte Winterbottom*, 18 Q.B.D., 446.

(a) S. 13, Act of 1897. As to former practice, vide *In re Oppenheimer*, 3 A.J.R., 91. *In re Martin*, 5 V.L.R. (I.), 13.

(b) S. 109, Act of 1897. Vide also "Partners," ante, at p. 91 et seq.

(c) *Moss v. Smith*, 1 Camp., 489; *Ex parte Haywood*, 6 L.R. Ch., 646; 40 L.J. Bank., 49. *In re Sadler, ex parte Whelan*, 27 W.R., 156; *Ex parte*

*Holding*, 1 G. & J., 97.

(d) *Ex parte Thomas*, 1 Atk., 73; and vide *Glaister v. Hever*, 7 T.R., 498.

(e) *In re Synnot*, 4 V.L.R. (I.), 89.

(f) S. 37, Act of 1890. Prior to this provision being enacted in the *Bankruptcy Act* 1889 a petition could not be based on an equitable debt; *Ex parte Hawthorne*, Mont., 132.

(g) S. 106 (2), Act of 1897—compare *Bankruptcy Act* 1883, s. 6.

(h) *In re Lawler*, 4 V.L.R. (I.), at p. 9. As to a liquidated debt see *Ex parte Broadhurst*, 22 L.J., Bank., 21; *Owen v. Routh*, 23 L.J.C.P., 105.

(i) *In re Taylor, ex parte Young*, 17 V.L.R., 121; vide also *Ex parte Sturt, In re Pearcey*, L.R. 13 Eq., 309.



The law is now otherwise (*k*). When a creditor agreed in writing to renew a bill of exchange if the interest was paid from time to time, and the interest was paid and the bill renewed; but before the renewed bill became payable the debtor committed an act of bankruptcy, proceedings were held to be rightly based on the undue bill (*l*). When a creditor takes a bill of exchange his remedies are suspended *prima facie* by such conditional payment, but the period of credit is determined by the act of bankruptcy (*m*).

If the debt is barred by the Statute of Limitations it cannot support a petition (*n*).

A debt dependent on a contingency, as for instance in the case of a promissory note in form a present debt, but its payment subject to a contingency, is not a good petitioning creditor's debt (*o*). The debt must amount to £50 (*p*), and where it is founded on a judgment of the Supreme Court, it is available for purposes of sequestration when accumulations of interest have raised it above the sum of £50. Interest is a mere matter of calculation, differing from a *quantum meruit* or damages (*q*). The claim and costs forming the judgment debt would form a good petitioning debt (*r*), but when the costs of an execution are added to the amount of the judgment to make up the statutory amount, it is not a good petitioning debt (*s*). A judgment debt recovered in tort may be relied on as well as a judgment recovered on contract (*t*). The debt may be the payment by one of several sureties on behalf of the debtor, and where sureties pay, each sum paid by either of them respectively is a separate debt due (*u*). It is no objection

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Debt due but not payable.

Statute of Limitations.

Debt dependent on a contingency.

The amount.

Accumulations of interest.

Accumulation of costs.

Judgment in tort.

Debt of sureties.

(*k*) S. 106, Act of 1897.

(*l*) *In re Barr, ex parte Wolfe* (1896), 1 Q.B., 616. Under the earlier English Statutes, prior to the *Bankruptcy Act* 1869, a debt presently due and payable in the future would support a petition, but by that Act, which the Act of 1890 here followed, the law was changed, as it contained no provision to that effect. The earlier Victorian Statute, 28 Vict. No. 273, s. 15, adapted from 5 Vict. No. 17, s. 14, also provided that the petitioning creditor's debt might be a "sum payable at a certain future time, "which time shall not have arrived "when the act of insolvency was committed."

(*m*) *In re and ex parte Raatz*, (1897)

2 Q.B., 80; 4 Manson, 127.

(*n*) *Quantock v. England*, 2 W., Bl. at p. 704.

(*o*) *Vide Ex parte and in re Page*, 1 G & J., 100. The contingency here was if the wife died before the husband. *Vide also In re Kellackey*, 3 V.L.R. (I.) 96.

(*p*) S. 37, Act of 1890.

(*q*) *In re Wilson*, 3 V.L.R. (I.) 95.

(*r*) *Vide In re Wilson, ante*.

(*s*) *In re Long ex parte Cuddeford*, 20 Q.B.D., 316; *vide also Marquis of Salisbury v. Ray*, 8 C.B. (N.S.) 193, and *Re Miller*, 11 W.K., 374.

(*t*) *In re Allen*, 5 V.L.R. (I.), 25.

(*u*) *In re Inglis*, 3 V.L.R. (I.), 100.

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Guarantee to pay  
solicitor's costs.

Solicitor's  
undelivered  
untaxed costs.

Judgment debt.  
Original debt not  
extinguished.

Inquiry into  
judgment.

to such a debt that a notice required by the surety bond to be given by the principal creditor has not been given. If the sureties are informed in any way that the principal creditor intends to proceed, and they pay with the approval of the debtor, it is a payment made to his use, and therefore a debt (*v*). The debt can be a guarantee to pay a bill of costs of another person for over £50, notwithstanding that no signed bill has been delivered. The provisions of the Act in that respect regard actions between the solicitor and client only, and not between a solicitor and third person guaranteeing to pay the bill (*w*). A solicitor may petition without (as in the case of an action) having delivered his bill, as otherwise he would be in a worse position than other creditors (*x*). Delivery and taxation would probably be ordered on application before the matter was made absolute (*y*), and should it then be found insufficient to satisfy the Statute, the sequestration could be revived on the petition of a creditor whose debt was of the statutory amount, and had been incurred prior to the order *nisi*, and be proceeded in as if it were originally obtained on the petition of such creditor (*z*). For certain purposes a debt is extinguished in a judgment debt, but the original debt for the purpose of supporting a petition is not extinguished, and it is immaterial whether the petition is founded on the original debt or on the judgment (*a*).

A judgment is *prima facie* proof of a debt, and where it is the result of a real fight between the parties it is conclusive (*b*), but as the Court has to determine as to the existence of a petitioning creditor's debt and is apparently to be satisfied with the proof of such (*c*), the judgment may be inquired into to ascertain the amount due on it in order to ascertain whether it forms a sufficient petitioner's debt (*d*), and where it is shown that the creditors have agreed with the debtor not to enforce the judgment until after

(*v*) *In re Inglis*, 3 V.L.R. (I.), 100.

(*w*) *In re Lawler*, 4 V.L.R. (I.), 8.

(*z*) *Ex parte Sutton*, 11 Ves., 163; 8 R.R., 121. *Ex parte and in re Howell*, 1 Rose, 312.

(*y*) *Vide Ex parte Prideaux*, in *re Symes*, 1 G. & J., 28, where it was held that in a commission taken out upon a debt due to solicitors for costs, any creditor (as every creditor has an interest in the costs), may have the bill of costs taxed if the bankrupt at the

time of his bankruptcy was not concluded. See also *Ex parte Howell*, *ante*.

(*z*) S. 49, Act of 1890.

(*a*) *In re and ex parte King and Beesley*, (1895) 1 Q.B., 189; *Bryant v. Withers*, 2 M. & S., 123; 14 R.R., 609.

(*b*) *Vide Ex parte Banner*, in *re Blythe*, 17 Ch. D., at p. 484.

(*c*) *Vide ss. 37, 47, Act of 1890.*

(*d*) *In re Monks*, 12 V.L.R., 712.

the happening of a certain event, and which has not happened, the debt is merely a contingent one and not an absolute one (e). The early authorities as to reviewing a judgment were considered in *Ex parte Gregory, in re Royce* (f), and it was then held that the same could be reviewed upon the grounds of an equitable defence or of collusion between the insolvent and the creditor obtaining the judgment, the latter being a ground which it is open to a creditor to raise, but not to the insolvent. In the case of *In re Lee* (g), it was considered too late to inquire into the consideration of the judgment or that it had been procured by fraud, the judge there suggesting that proceedings should have been taken to set the judgment aside. The question also arose in the case of *Re Fitzgerald* (h), but it was undecided, it being stated that it was a somewhat confused one on the authorities. It has been the settled rule from an early period in the English Court of Bankruptcy that the consideration of a judgment may be inquired into, for otherwise a debtor, by allowing judgments in favour of friends, might prevent the proper distribution of his property among his *bond fide* creditors and allow improper proof to be voted on (i), and the Court there does not regard it as a question between the judgment creditor and the judgment debtor, as bankruptcy proceedings are not ordinary proceedings, but exercises its rights to be satisfied with the petitioning creditor's debt in the interests of the whole of the creditors of the debtor (k), and the inquiry will be made at the instance of the debtor himself though he has consented to the judgment (l). The Court in question will also go behind a judgment or a compromise if it can see that the original claim was not *bond fide* (m), and where the judgment is the result of a compromise it will inquire into such and reject the debt as a good petitioning debt if it sees that the compromise, although not fraudulent, was unfair and unreasonable (n). Where the debt is so inquired into and rejected as a good petitioning creditor's debt the same does not amount to a *res judicata* with respect to the sufficiency of the petitioning

Reviewing  
judgment.

*Res judicata* as  
to such reviews.

(e) *Re Merry*, 14 V.L.R., 176.

(f) 1 W.W. & a'B. (I.), 57.

(g) 7 V.L.R. (I.), 117.

(h) 14 A.L.T., 224.

(i) *Vide Ex parte and in re Lennox*, 16 Q.B.D., at p. 328; *Re Fraser, ex parte Central Bank of London*, (1892) 2 Q.B., 633, 637; *In re Hawkins, ex parte*

*Troup*, (1895) 1 Q.B., 404.

(k) 16 Q.B.D., at pp. 321 and 328.

(l) *Ibid*, at p. 315; *Ex parte Kibble, re Onslow*, L.R. 10 Ch., 373.

(m) *Ex parte Banner, in re Blythe*, 17 Ch. D., 480.

(n) *In re Hawkins, ex parte Troup*, (1895) 1 Q.B., 404.

**CHAP. IV.** creditor's debt, and does not prevent the creditors from instituting fresh bankruptcy proceedings in respect of the same judgment debt (*o*), as the judgment still exists.

Effect of  
garnishee order  
on debt.

The debt remains due to the original creditor from the debtor though not payable to him after service of the order *nisi* for attachment, and forms a good petitioning debt (*p*). Until the money is paid to the garnishor the debt exists, and nothing except payment will discharge the debtor (*q*). There is no transfer of the debt by attachment. There is only a direction that the original creditor shall not receive the money and that somebody else shall (*r*).

Illegal  
consideration.

If the debt is founded on an illegal consideration it is insufficient (*s*).

Secured debt.

If the debt is a secured one the petitioner must state in his petition that he will be ready to give up the security for the benefit of the creditors after adjudication of sequestration, or give an estimate of its value, in which case the creditor is admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value estimated, and he must on application by the trustee after adjudication of sequestration, at any time before he has realised the security, give the same up to the trustee upon the payment to him of the value so estimated (*t*). The object of such is to prevent the creditor from under-valuing his securities in order to make up a sufficient debt (*u*). If the petitioner does not comply with the provision of the section the order *nisi* will be discharged although he has, before the hearing, given notice of his security with an estimate of its value and signified his willingness to give it up (*v*). This rule, however, is sufficiently complied with by stating that the value of the security is a certain specified sum "or thereabouts," the latter words being held not to vitiate the proceedings (*w*). When the petitioner

Redemption of  
security by  
trustee.

Valuation of  
security.

(*o*) *In re and ex parte Vittoria*, (1894) 2 Q.B., 387.

(*p*) *In re McMeekan*, 22 V.L.R., 271; 2 A.L.R., 213; 18 A.L.T., 80.

(*q*) *Ibid.*, referring to *Turner v. Jones*, 1 H. & N., 876.

(*r*) *Ibid.*, referring to *Chatterton v. Watney*, 16 C.D., 378; 17 C.D., 259, and *Re Combined Weighing, &c., Company*, 43 C.D., 99.

(*s*) *Wells v. Girling*, 1 B. & B., 447.

(*t*) S. 37, Act of 1896, r. 170a. As

to what is a secured debt and a secured creditor, *vide* Chapter V., Division 3, "Proofs of Debt," *post*.

(*u*) *Vide Re Fitzgerald*, 14 A.L.T., at p. 226.

(*v*) *In re McNamara*, 10 V.L.R. (I.), 84, commenting on *Ex parte Vanderlinden*, in *re Pogose*, 20 C.D., 289.

(*w*) *In re Hawkins*, 12 V.L.R., 317; *vide also Ex parte Taylor, re Lacey*, 13 Q.B.D., 128.

holds several securities which relate respectively to different portions of the debt they can be valued as securities for the whole debt without distinguishing the particular portion of the debt to which each security relates, and therefore where the petitioning creditor distinctly states a debt and that he holds security for it and estimates its value at a specific sum, thus binding himself to accept that sum in discharge of his security, he does all the statute requires of him at that stage (*x*). The question whether the security has been truly valued or not cannot be entertained by the Court upon the hearing (*y*). Though the omission to value or to give up the security is a good objection to an order being made absolute, it is not a ground for setting the sequestration aside afterwards on the application of the insolvent (*z*). It is sufficient if the petition states that the security is valued at *nil* (*a*), but it is insufficient to state that the security has no marketable value, as a value should be set on it; or if it is valueless the petitioner should say so and offer to give it up for the benefit of creditors (*b*), and a petitioning creditor who is jointly interested with others in a security may, as far as he is concerned, value it at nothing and give it up for the benefit of creditors generally, as other persons than the petitioning creditor are involved in the security, the difficulty that is presented in giving it up is a matter for the trustee (*c*). The promissory note of a debtor is not a security within the meaning of the Acts, and the provision need not be complied with (*d*), but where the petitioning creditors had taken from one of the respondent's debtors a promissory note, and having discounted it, used the proceeds, and refused to give the respondent credit for the amount until the note was honoured, and they also held other promissory notes from the respondent's debtors which were overdue and dishonoured, it was held that all the promissory notes were clearly securities, and as the petitioning creditors neither valued them nor offered to give them up the order was discharged (*e*).

Promissory  
notes as  
securities.

(*x*) *Re Fitzgerald*, 14 A.L.T., 224.

(*y*) *In re Hawkins*, ante. *Ex parte Taylor*, ante.

(*z*) *In re Rowley*, 2 V.L.R. (I.), 50-57.

(*a*) *In re Elkington*, 13 A.L.T., 249.

(*b*) *In re Harward*, 4 V.L.R. (I.), 65.

(*c*) *In re Inglis*, 3 V.L.R. (I.), at p. 103.

(*d*) *In re Cohen*, 15 V.L.R., 664. As

to estimating the value of a current bill of exchange or promissory note as a security for the purposes of voting, vide "Meetings of creditors: Proxies and Voting," Chapter V., Division 1, post.

(*e*) *In re Tucker*, 13 V.L.R., 551; vide also *In re Bayldon*, ex parte *Bank of Australasia*, 1 V.L.R. (I.), 10; sed vide *Ex parte Schofield*, in re *Firth*, 12

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Guarantee not a security,

nor is seizure under execution.

Effect of giving up mortgage security on other mortgagees.

Security on joint estate.

Statement of time.

The act of insolvency must be set out in petition.

A guarantee for a debt given by a third person is not a security for the debt within the meaning of the section (f); nor does that security which a creditor has where execution issued against the debtor has been levied by seizure make the debt a secured debt within the section (g), for, by the terms of the 76th section Act of 1890, such security, as soon as the order *nisi* for sequestration is signed, becomes superseded, and if the order *nisi* be made absolute, the security is extinguished, and the property passes unencumbered to the estate, and is divided amongst the creditors (h). A mortgagee in giving up his security merely places the trustee in his position, and in doing so the rights of prior or subsequent mortgagees are not altered (i)

A creditor petitioning for the sequestration of the separate estate of a partner need not offer to give up or value a security held by him over the firm's estate (k). The only security, therefore, which he is obliged to offer to give up or value, is a security held by him over the estate of the debtor whose estate he seeks to sequester, and consequently where the petition is by a creditor for the sequestration of the joint estate he need not offer to give up or value securities which he may hold against the separate estate of any of the partners (l). The petition must state that the act of insolvency has occurred within six months before its presentation (m), and where it stated that the act of insolvency was committed six months before the presentation of the petition the order was discharged, as it was not a mere want of form or omission that could be amended under s. 31, Act of 1890 (n). The day on which the petition is presented is not included (o). The act or acts of insolvency must be clearly set out in the petition, as the respondent is entitled to be accurately informed of the act of insolvency alleged (p), as, for instance, a petition only alleging that the defendant had a judgment against him not satisfied, without alleging that the defend-

C.D., 337.

(f) *In re Whittles*, 18 V.L.R., 684.

(g) *In re Kennedy, ex parte Tatterson*, 18 V.L.R., 688.

(h) *Ibid.*, at p. 696.

(i) *Cracknall v. Janson*, 6 C.D., 735.

(k) *Re Stevenson*, 19 V.L.R., 660;

15 A.L.T., 119.

(l) *Rolfe v. Flower*, 1 L.R., 1 P.C., 27.

(m) S. 37, Act of 1890.

(n) *In re Reade*, 2 V.L.R. (I.), 83; *sed vide* p. 45, *ante*.

(o) *Re Hansen, ex parte Forster*, 4 Morrell, 98.

(p) *In re Chambers*, 1 W. & W. (I.), 172, and *vide In re Murray*, 1 V.R. (I.), 8; *In re Synnott*, 4 V.L.R. (I.), 89.

ant had been required to satisfy it, was bad (*g*). A petition which alleges "departing from his dwelling-house or otherwise absenting himself" must allege that the debtor did so with intent to defeat or delay his creditors. Such a defect is a matter of substance and not a merely formal defect, and it cannot be cured by amendment (*r*). In a petition which purported to allege an act of insolvency under sub-s. (*x*), wherein it was stated "the preference would, as the petitioners are advised, be a fraudulent preference," the petition was amended, at the hearing by striking out the words, "as your petitioners are advised." The order *nisi* was also amended as no injustice would in the opinion of the Court be done (*s*). The date of the act of insolvency need not appear in the petition, as it is sufficient if it appear in the affidavit verifying it (*t*). The petition itself need not be dated (*u*).

The date of act of insolvency and of petition.

The petition must pray that the estate of the debtor may be sequestrated for the benefit of his creditors (*v*), and where it prayed for the sequestration of the estate of the petitioning creditor the order was discharged (*w*). Where the petition omitted the prayer the omission was fatal (*x*). The petition must be signed (*y*), and if it is presented by an agent his authority to sign and present it must be proved (*z*). Where a firm petitions the petition is duly signed if it is signed by one of the partners with the name and style of such firm. His own name must be added as set out in r. 285, *post* (*a*). In the case of a corporation its seal is a sufficient signature (*b*). In a case where the signature was objected to it was held that as the order *nisi* was correct the judge could not look at the petition on a preliminary objection (*c*).

The prayer.

Signature to petition.

The petition must have indorsed thereon the district in which the respondent resides, that is, the place of his bodily residence or the place where his business is carried on (*d*). The respondent or a firm is deemed to reside in the district in which he or such

Indorsement of district on petition.

(*g*) *In re Chambers*, ante; and *vide In re Fisher*, 1 W.V. & A.B. (I.), 31.

(*r*) *Ex parte Coates*, in *re Skelton*, 5 Ch. D., 979. *Sed vide* "Powers of amendment" under Act of 1897, p. 45, ante.

(*s*) *In re Dionisio*, 14 V.L.R., 326-332.

(*t*) *In re Wolter*, 4 V.L.R. (I.), 75.

(*u*) *In re Gibb*, 2 W. & W. (I.), 40.

(*v*) S. 37, Act of 1890.

(*w*) *In re Murray*, 1 W. & W. (I.),

137.

(*x*) *In re Rickards*, 5 A.J.R., 103.

(*y*) *In re Barry*, 1 W. & W. (I.), 174.

(*z*) *In re Jenkins*, 15 V.L.R., 271.

(*a*) S. 22, Act of 1890; and *In re Vagg*, 13 V.L.R., 172.

(*b*) *In re Jenkins*, ante; *vide also* r. 284, as to a public officer or agent.

(*c*) *In re Ritchie*, 8 V.L.R. (I.), 2.

(*d*) S. 51, Act of 1890. *In re Bayl-don*, 2 V.L.R. (I.), 95.

**CHAP. IV.** firm has traded or carried on business during the preceding six months or the longest period during six months (*e*). Where a wrong district was indorsed, the order *nisi* was discharged (*f*), leave to amend being refused, but the absence of any indorsement does not render the order *nisi* invalid or affect the jurisdiction to make the order absolute (*g*).

Amendment of petition.

No petition is invalidated by reason of any want of form or omission therein unless the Court or judge is of opinion that substantial injustice has been caused by such want of form or omission, and that such injustice cannot be remedied by order of the Court or judge (*h*). The power of the Supreme Court and the Court to amend has been extended by s. 10 (2), Act of 1897, adapted from s. 105 (3) of the *Bankruptcy Act* 1883 (*i*). A petition cannot be amended by adding as petitioners creditors whose debts are other than those in respect of which the petition is presented, after six months have expired from the act of insolvency (*j*).

Forms of petition.

A form of petition is given in form No. 14, Schedule of Forms, *post*. That in a deceased person's estate is form No. 15.

Verification of petition.

The petition must be generally verified by the affidavit of the petitioning creditor or creditors or one of them as follows:—

(1) As to all the material facts therein stated; and (2) the date of the alleged acts of insolvency (*k*). The affidavit can also be made by the duly authorised agent or agents of such creditors or creditor, stating, besides the verification of the petition, that he is duly authorised, and disclosing facts within his own knowledge which account for the inability of the creditors or creditor to verify the same (*k*). Rule 284 provides that where a corporate body is petitioner any affidavit in support of such petition may be made by a director or other officer on its behalf. Forms of affidavits in support are given in forms 16 and 17, *post*. The petition must also be verified by the affidavit of the sheriff's officer or other person best informed of the fact of the alleged act

Forms of affidavits.

(*e*) Ss. 4, 51, *ibid*. As to residence of and carrying on business by debtor, *vide Ex parte Breull, re Bowie*, 16 C.D., 484; and *Graham v. Lewis*, 22 Q.B.D., 1.

(*f*) *In re Platt*, 15 V.L.R., 668.

(*g*) S. 51, Act of 1890.

(*h*) S. 31, *ibid*.

(*i*) *Vide* Chapter II., at p. 45, *ante*.

(*j*) *Vide In re and ex parte Maund*, (1895) 1 Q.B., 194. *Sed vide* as to revival of order *nisi* Division 12 of this Chapter.

(*k*) *Rules of the Supreme Court* 1884, r. 3; and *Insolvency Rules*, r. 170.



of insolvency (*l*). These provisions have been interpreted as requiring that the petition should be verified paragraph by paragraph (*m*). But it is not a matter of certainty, as the word "generally" is embarrassing (*n*). The main object of the rule, however, is transparent, namely, that the witness or witnesses most competent to speak of their own knowledge, of whom the petitioning creditor would usually be one, should depose to the material facts (*o*). Where the affidavit on which the order was granted did not show before whom it was sworn, the defect was held not to be fatal on the motion to make the order absolute (*p*). The affidavit of the sheriff's officer verifying the petition may be sworn at any time before the petition is presented (*q*). Where the date is omitted in the jurat notice of such an objection should be given (*r*). The petition and affidavits in support should be deposited with the judge or his associate before the order *nisi* is signed (*s*). The judge may, under circumstances, dispense with the above affidavits, or require further evidence by affidavit or *vivâ voce* examination upon the above or other matters (*t*), and the Court has also power at the hearing to call the petitioning creditor as a witness, and to obtain evidence from him of the whole transaction upon which the insolvency proceedings were based (*u*).

Lodging of petition and affidavits.

Judge may dispense with the affidavits or require further evidence.

# 7.—ACTS OF INSOLVENCY UNDER S. 37, ACT OF 1890, AND THEIR NATURE.

There are ten acts of insolvency under s. 37, Act of 1890 (*v*), the first of which is as follows:—

*That the debtor has in Victoria or elsewhere made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally (w).*—The conveyance or assignment, to be an act of insolvency within the sub-section, must be a conveyance or assignment in the proper sense of the term,

Act I.

The conveyance or assignment.

- (*l*) *Ibid.*
- (*m*) *In re Penglase*, 15 V.L.R., at p. 441.
- (*n*) *Ibid.*
- (*o*) *Ibid.*
- (*p*) *In re Richmond*, 3 V.L.R. (I.), 109.
- (*q*) *In re Junner*, 14 A.L.T., 247.
- (*r*) *In re Ryan*, 7 V.L.R. (I.), 122.
- (*s*) *Supreme Court Rules*, ante, No. 4.

- (*t*) *Supreme Court Rules* 1884, r. 31.
- (*u*) *In re Smart and Walker*, ex parte Hill, 20 V.L.R., 97.
- (*v*) There is another act of insolvency, that under s. 50, Act of 1890, vide post, Part 13 of this chapter.
- (*w*) S. 37, Act of 1890—compare 32 & 33 Vict., c. 71, s. 6; 46 & 47 Vict., c. 52, s. 4 (a).

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by which the whole, or substantially the whole, of the debtor's property is vested in a trustee or trustees for the benefit of the creditors generally. Other modes of disposition not properly conveyances or assignments, such as a declaration of trust by the debtor or a mere agreement by him that his property shall be dealt with for the benefit of his creditors, will not suffice (x).

The expression  
"creditors  
generally."

Certain of the Victorian decisions have been referred to as a series of cases in which the Court raised a fabric of subtlety, storey on storey, until it thought it had gone far enough (y). Thus deeds which gave the trustee the power or discretion of preferring certain creditors were held not to be acts of insolvency (z). The authorities referred to are neutralised by s. 106, Act of 1897, which enacts that "the expression creditors "generally," shall include all creditors who may assent "to the "conveyance or assignment mentioned in sub-s. 1, s. 37, Act of "1890, and whether or not such conveyance or assignment provides that any of the creditors shall have any preference or "priority as regards any other creditors, and whether or not the "trustee (if any) thereof, or any other person shall have any "discretion as to giving any creditor a preference or priority or "any advantage as regards any other creditor." Where the trust in favour of the preferential creditors is absolute and puts them in the same position as they would occupy if the estate were being administered in insolvency under the Acts, and the residue of the estate is applied towards the payment of the debts of the creditors other than those entitled preferentially, the deed is an act of insolvency (a). For the benefit of "creditors generally" means for the benefit of "all the creditors" (b), and a deed for the benefit of scheduled creditors it has been held is not an act of insolvency (c), but in *Thomas v. Cowie*, 9 V.L.R., at p. 14, the expression used is "scheduled creditors not comprising all."

The words "or  
elsewhere."

As to the words "or elsewhere," see *post* as to Act of Insolvency II.

(x) *Re Spackman, ex parte Foley*, 24 Q.B.D., 728; *vide also Re and ex parte Hughes*, (1893) 1 Q.B., 595.

(y) *Bergin v. Dixon*, 20 V.L.R., at p. 144.

(z) *In re Ritchie*, 8 V.L.R. (I.), 1; *In re Wiedeman*, 5 V.L.R. (I.), 32; *In re Thomas and Cowie*, 9 V.L.R. (I.), at p. 6; *vide also Beeston v. Donaldson*,

18 V.L.R., 208; *In re Thoneman*, 12 V.L.R., 691; *Davey v. Danby*, 13 V.L.R., 957.

(a) *In re Vagg*, 13 V.L.R., 172.

(b) *Beeston v. Donaldson*, 18 V.L.R., at p. 213.

(c) *In re Derham*, 1 V.L.R. (I.), 2; *In re Haslam*, 3 V.L.R. (I.), 10.

If the deed is delivered as an escrow merely, it is apparently not an act of insolvency (*d*), but as soon as one or more of the creditors have executed it the debtor cannot revoke it, and the deed is an act of insolvency if it in other respects complies with the sub-section (*e*). It does not affect the deed as an act of insolvency, if it contains provisos as to avoidance, such as a proviso for the deed to be void if the trustees think fit (*f*), neither does the fact that the deed has been destroyed (*g*). Joint debtors, whether partners or not, can commit this act of insolvency, and their estate may be sequestrated on petition (*h*), but the deed is only an act of insolvency as to those who execute it (*i*).

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When deed delivered as an escrow.

Provisoes for avoidance.

Destroyed deed.

Joint debtors as to this act of insolvency.

A conveyance or assignment of the property within this sub-section must be, as pointed out, the whole or substantially the whole of the debtor's property (*j*). It is not unusual to permit the debtor to retain possession of his furniture either permanently or temporarily (*k*), and therefore, the exception of furniture and necessaries to the value of £200 out of a large estate is immaterial (*l*). In this case it was separate property of a partner, but it is unsafe, however, in determining what is a colourable exception to lay stress on the fact that separate property only is excepted from a deed which assigns the property of a firm (*l*). An assignment of all the debtor's property to trustees, excepting leaseholds, in respect of which the debtor executed a declaration of trust in favour of the same trustees, was held to be a "conveyance or assignment" of all the debtor's property within the sub-section (*m*). A deed for "the benefit of creditors generally" is not one made with intent to defeat or delay creditors (*n*). The word "fraudulent" is now dropped out of the description (*o*). In England, while the distinction between traders and non-traders existed, an assignment of the whole of a trader's property, or of the whole with a colourable exception, was considered fraudulent.

The property conveyed or assigned.

Intent to defeat and delay creditors.

(*d*) *Vide Bowker v. Burdekin*, 11 M. & W., 128.

(*e*) *Vide Beeston v. Donaldson*, 18 V.L.R., at p. 214; *Davy v. Schurmann*, 7 V.L.R. (L.), at p. 193.

(*f*) *Tappenden v. Burgess*, 4 East, 230.

(*g*) *Lees v. Whiteley*, 2 L.R. Eq., 143.

(*h*) *In re Thomas and Cowie*, 9 V.L.R. (L.), at p. 10.

(*i*) *Ibid.* *Bowker v. Burdekin*, 11 M. & W., ante. *Vide also Allan v. Hart-*

*ley*, 4 Doug., 20.

(*j*) *Re Spackman, ex parte Foley*, 24 Q.B.D., 728.

(*k*) *Vide Beeston v. Donaldson*, 18 V.L.R., at p. 213.

(*l*) *In re Thomas and Cowie*, 9 V.L.R. (L.), at p. 14.

(*m*) *In re and ex parte Hughes*, (1893) 1 Q.B., 595.

(*n*) *In re Vagg*, 13 V.L.R., at p. 185.

(*o*) *In re Thomas and Cowie*, ante, at p. 15.

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Production of  
deed to  
creditors.

lent, and when such distinction was abolished (*p*) the same character was attached to a similar assignment by a non-trader (*q*). A petitioning creditor was saved from payment of costs on the discharge of the order, the deed not being for the benefit of the creditors generally, in consequence of the trustees under it having refused to allow him to inspect it (*r*).

Estoppel.

Acquiescence of  
creditor in deed.

Where a deed is assented to by a creditor, it cannot be availed of as an act of insolvency by him (*s*). Where the creditor attends the meeting and neither assents to nor dissents from the assignment, it can be availed of as an act of insolvency by him (*t*). The assent may be made by the creditor's solicitor, as when the latter (the interest of the creditor being left in his hands), attended the meeting at which resolutions were passed, and a trust deed was prepared by him. The resolutions were communicated to the creditor, who was also informed of the declaration of a dividend, and no objection was made by him. It was held that the deed could not afterwards be set up as an act of bankruptcy (*u*), neither can it when the creditor acquiesces and takes a benefit under it, although it might be that he had not so far assented to it as to be bound by its provisions (*v*). Another result of the authorities is that a creditor who is party or privy to the deed, or who has acted in any way which would be equivalent to an assent, recognition or approval of the deed, cannot allege that the execution of the deed is an act of insolvency (*w*); but although a creditor gives his assent to a proposal of the debtor to assign his estate for the benefit of his creditors, yet it has been held if the deed contains an unexplained stipulation in favour of a particular creditor the first-mentioned creditor is not bound by the deed (*x*). And where the execution of the deed was connived at, and the debtor was fraudulently induced to execute it, the deed could not be availed of as an act of insol-

(*p*) *Ibid*, at p. 14.

(*q*) *Ibid*.

(*r*) *In re Haslam*, 3 V.L.R. (I.), 10.

(*s*) *In re Vail*, 1 V.L.R. (I.), 5; *In re Eastwood*, 5 A.J.R., 61, over-ruled; *Ex parte Cawkwell*, in *re Paget*, 1 Rose, 313; *Ex parte Alsop*, *re Rees*, 29 L.J. Bk., 7; *In re and ex parte Michael*, 8 Morrell, 305.

(*t*) *In re Wiedeman*, 5 V.L.R. (I.), 32.

(*u*) *Ex parte and in re Tealdi*, 1 M.D.

& D., 210.

(*v*) *Ex parte and in re Stray*, 2 L.R. Ch., 374; *In re Adamson*, *ex parte Viney*, 2 Manson, 153; *In re Hawley*, *ex parte Ridgway*, 4 Manson, 41; *In re and ex parte Woodroff*, 4 Manson, 46.

(*w*) *Vide note (u)*, *ante*.

(*x*) *Ex parte and in re Marshall*, 1 M.D. & DeG., 575. As to misstatements, *vide Re Tanenberg*, *ex parte Peurier*, 6 Morrell, 49.

veny by the creditor concerned (y). The *Stamps Act* 1892 does not apply to a deed of assignment for the benefit of creditors, though it contains no release to the debtor (z), but were it dutiable and unstamped, its admission as an act of insolvency could not be objected to (a). When the deed is registered under the provisions of the Act of 1897, the production by the petitioner of an office copy of the deed is sufficient *prima facie* proof of the commission of the act of insolvency, but the Court may always require further evidence if it thinks it desirable (b). The registration of the deed under the provisions of the same Act (*vide* "Deeds of Arrangement," *post*) does not prevent the deed from being an act of insolvency if it can be taken advantage of as such (c).

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*Stamps Act* 1892.

Production of office copy *prima facie* proof of act of insolvency.

Effect of registration of deed as an act of insolvency.

A deed of assignment, the act of bankruptcy alleged being its execution, contained a clause releasing the debtor from "all debts, claims and demands whatsoever" to the date thereof, and the official receiver, as trustee in the subsequent bankruptcy of the debtor, disallowed the proofs tendered by the creditors, who had signed the deed on the ground that by executing it they had released their debts. On appeal, it was held that the question was one of intention, and that the intention was that the deed was not to operate in the event of bankruptcy and the release was to hold good in case the consideration for which it was given should hold good, and not otherwise, and that therefore the creditors were entitled to prove (d).

Right of parties or creditors to deed to prove in subsequent insolvency of debtors.

*That the debtor has in Victoria or elsewhere made a conveyance, gift, delivery or transfer of his property or of any part thereof with intent to defeat or delay his creditors (e).*—The object of this sub-section is to secure an equal distribution of the insolvent's estate amongst his creditors. Dealings with the insolvent within three months of the date of sequestration of the nature indicated by it are generally impeached on this ground, combined with the effect of s. 71, Act of 1890, as well as on the

Act II.

(y) *Re Bankier*, 4 A.J.R., 90.

(z) *Ex parte Brett*, 18 A.L.T., 8. S.C., *sub nom.*, *Ex parte Speed*, 2 A.L.R., 137.

(a) *In re Mangels*, 17 A.L.T., 220; *Ex parte Squire*, in *re Gouldswell*, L.R., 4 Ch., 47, followed. *Vide also Re Hollinshead*, *ex parte Heapy*, 6 Morrell, 66; *Ponsford v. Walton*, L.R. 3 C.P., 167.

(b) *In re and ex parte Slater*, 4 Man-

son, 118.

(c) *In re Batten*, *ex parte Milne*, 22 Q.B.D., at p. 693. *Vide* s. 81, Act of 1897.

(d) *In re Stephenson*, *ex parte Official Receiver*, 5 Morrell, 44.

(e) S. 37, Act of 1890—compare 32 & 33 Vict. c. 71, s. 6, sub-s. 2; 46 & 47 Vict. c. 52, s. 4 (b).

**CHAP. IV.** grounds set out in s. 73 of that Act relating to fraudulent preference.

The words  
"or elsewhere."

Though the conveyance or other document may be executed outside the limits of Victoria, it should, to be an act of insolvency, be one, on the analogy of the case of *Ex parte Crispin*, L.R., 8 Ch., 374, intended to be in accordance with the Victorian law, and not a document executed by a person domiciled elsewhere and operating according to the law there. In the case referred to it was said in referring to the words "or elsewhere" that the section clearly meant fraudulent by the law of England, and therefore could not apply to a conveyance which was executed in and was to operate according to the law of a foreign country.

Applicability of  
English  
decisions as to  
this act of  
insolvency.

It is important to note, however, that s. 73 only operates for three months prior to the sequestration; but this sub-section, combined with s. 71, operates to render void transactions of the nature indicated by it that have occurred within six months before the presentation of the petition for sequestration (*f*). The provision first appeared in the *Insolvency Act* 1871, and differs from the English Acts of 1869 and 1883 by having the word "fraudulent" eliminated, and the words "with intent to defeat" or "delay his creditors" added. The English Act runs:—"If in England or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property or any part thereof." The words "with intent to defeat or delay his creditors," however, were included in the relative section of the prior English Acts, 6 Geo. IV., c. 16, s. 3, and the Act of 1849, s. 67. The result of the difference is set out (*g*) as follows:—"It has been intimated by the Full Court in *Michael v. Oldfield* (*h*), that our s. 37 (*II*), differing in its terms from the corresponding section of the English Act 32 & 33 Vict. c. 71, s. 6, the English decisions upon that sub-section are not applicable to the construction of our sub-section, and that to bring a case within our law it must be shown that in the operation of the debtor's mind there was an intent by him to defeat or delay his creditors."

The test applicable to the English sub-section—Did the lender intend that the advance should enable the debtor to carry on his

(*f*) *Vide* latter part of s. 37, Act of 1890. 962.

(*g*) *Davey v. Danby*, 13 V.L.R., p.

(*h*) 13 V.L.R., p. 793.

business, and had he a reasonable ground for believing that it would enable him to do so? (i) is a wholly inaccurate test to apply to cases under this sub-section, the words *with intent to defeat or delay his creditors*, pointing exclusively to the intention of the debtor and borrower, and excluding the intention of the creditor and lender (k). CHAP. IV.

Two classes of dealings with the debtor are comprised within the terms of the sub-section:—(1) Those in respect of the whole of the debtor's property. (2) Part of the debtor's property. Classes of dealings within the sub-section.

The authorities treat of cases in which the transaction has dealt with the whole or part of the debtor's property, (A) for a past debt, (B) for a past debt and present advance, (C) for a past debt and future advance. As to the first of these cases it is well known as a rule of law applicable in all cases (l) that an assignment of the whole of the debtor's property or the whole with a colourable exception to a creditor must necessarily defeat and delay his creditors, and the debtor must be presumed to have intended the necessary consequences of his act (m). Conveyance of whole of property.

If the security is given in pursuance of a promise made or by an agreement stipulated at the time the consideration was received, the debt incurred is not a past debt, but is regarded as if the security were given at the same time as the advance was made (n). It is necessary that the agreement should be an absolute one, as the debtor cannot undertake to give his creditor a security when required, that is, when the circumstances of the debtor should be such as to require the creditor to demand it (o). An assignment for the benefit of such creditors as the trustee may approve, of the whole of the debtor's property, is not of itself evidence of the debtor's intent to defeat or delay his credi-

(i) *Vide Ex parte Johnson, in re Chapman*, 26 Ch. D., p. 338, affirmed by the Privy Council; *The Administrator-General of Jamaica v. Lascelles, in re Rees*, (1894) App. Cas., p. 135.

(k) *Michael v. Oldfield*, 13 V.L.R., p. 811.

(l) *Hasker v. Moorhead*, 2 V.L.R. (L.), 166.

(m) *Vide also Mackay v. Jellie*, 17 V.L.R., p. 94; *Michael v. Oldfield*, 13 V.L.R., p. 802; *In re Cairns*, 17 A.L.T., 293; 21 V.L.R., at p. 712; 2

A.L.R., at p. 93. As to what is a colourable exception *vide Young v. Waud*, 8 Ex., 221; *Young v. Fletcher*, 34 L.J., Ex. 154; *Ex parte Bailey*, 22 L.J., Bk. 45.

(n) *Jacomb v. Ross*, 4 A.J.R., 97; *Ex parte Fisher, re Ash*, L.R., 7 Ch., 636.

(o) *Ex parte Fisher, re Ash*, ante, and *vide per James, L.J., Ex parte Burton, in re Tunstall*, 13 Ch. D., p. 108.

CHAP. IV. tors. Evidence outside the deed is required to prove the fraudulent intention (*p*).

In the second case, where the dealing is to secure a past debt and present advance, the intent of the assignor must be left to the jury as a question of fact (*q*).

The same observation can be applied to the third case, namely, that in which the security has been given for a past debt and future advance. In neither of these latter cases is the dealing, even if it comprises a man's whole property, *per se* an act of insolvency (*r*). It is a question *dehors* the deed whether it is fraudulent, and facts must be proved to impeach it (*s*), and there must necessarily be evidence to show what property the insolvent had at the time of the assignment, as in the absence of such evidence no presumption arises either way (*t*).

Limitation of time.

The equivalent.

Conveyance of part of property.

The provisions of the sub-section are barred if the transaction does not come within the statutory period, six months from the presentation of the petition (*u*), and a principle upon which the transaction is sometimes upheld, if it is within the statutory period, is the fact that the debtor has received into his estate an equivalent for his property or his security, as by such means an equal distribution of the debtor's estate is not interfered with. The equivalent, whether it consists of money paid down or other present advantage, prevents the deed from being *per se* an act of insolvency (*v*).

As to the other portion of the sub-section, namely, a conveyance, gift, delivery or transfer of any part of the debtor's property, an assurance of such for a past debt is not *per se* an act of insolvency (*w*). The part of the debtor's property excepted from the transaction must amount to a substantial exception. These cases

(*p*) *In re Wiedeman*, 5 V.L.R. (I.), 32; *Davey v. Danby*, 13 V.L.R., 957.

(*q*) *Michael v. Oldfield*, 13 V.L.R., at p. 802; *Hasker v. Moorhead*, 2 V.L.R. (L.), at p. 167.

(*r*) *Allen v. Bennett*, L.R. 5 Ch., 577; *Jacomb v. Ross*, 4 A.J.R., at p. 98.

(*s*) *Lomax v. Buxton*, L.R. 6 C.P., 107; *vide Jacomb v. Ross*, ante; *vide also Michael v. Oldfield*, ante.

(*t*) *Wedge v. Newlyn*, 4 B. & Ald., 831; *vide Jacomb v. Ross*, ante.

(*u*) See latter part of section, and *Ex*

*parte Games*, *re Bamford*, 12 Ch. D., p. 314.

(*v*) *Jacomb v. Ross*, 4 A.J.R., 98; *Ex parte Reed*, *in re Tweddell*, L.R., 14 Eq., 586; *Mercer v. Peterson*, L.R., 3 Exch., 104. As to what has been held by English Courts as not being a sufficient equivalent, *vide Ex parte Cooper*, *re Baum*, 10 C.D., 313; *Ex parte Payne*, *re Cross*, 11 C.D., 539.

(*w*) *Ex parte Field*, *re Marlow*, 13 Ch. D., 106.



are a class in which it is impossible to lay down a code of rules which will govern all so as to dispense with the obligation to examine the facts of each particular one. In each case, looking at all the circumstances, these questions of fact are to be answered:—Does the assignment include all the property, or is there a substantial exception? Is it wholly to secure a pre-existing debt? And, if there is a further advance, is it a substantial one or only one intended to give colour to a security which is in reality made only for the purpose of securing a pre-existing debt? (x). The intention to defeat and delay the creditor must also be proved as a matter of fact (y), and it must exist in fact and cannot be presumed (z), and to avoid a deed the intention must be, as under 13 Eliz. c. 5, an actual as distinct from a constructive intent (a). In the case of *Hasker v. Moorhead* (b), the words “conveyance with intent to defeat and delay his “creditors” were regarded as being synonymous with the words “fraudulent conveyance” in the English Act, but this does not accord with the decision of the Full Court in *Michael v. Oldfield* (c).

The intent to defeat and delay.

The word “delivery” is restricted in its meaning to delivery “Delivery.” with intent to pass the property (d).

*That the debtor has, with intent to defeat or delay his creditors, done any of the following things, namely, departed out of Victoria, or being out of Victoria remained out of Victoria, or departed from his dwelling-house, or otherwise absented himself or begun to keep house* (e).

Act III.

“Departed out of Victoria.”—The limits of Victoria are set out in 13 & 14 Vict. c. 59, s. 1, and 18 & 19 Vict. c. 54, s. 5 (f). If the departure is made with intent to delay the creditors, the act of insolvency is committed though no creditor be thereby in

Limits of Victoria.

(x) *Per James, L.J., Ex parte and in re King*, 2 Ch. D., p. 262. *Vide In re Cairns*, 21 V.L.R., at p. 712; 17 A.L.T., 294.

(y) *Hasker v. Moorhead*, 2 V.L.R. (L.), 160.

(z) *Vide Beeston v. Donaldson*, 18 V.L.R., 214.

(a) *Ibid.*

(b) *Ante.*

(c) 13 V.L.R., at p. 811; and see

*ante* p. 110.

(d) *In re Johnston*, 5 W.W. & A.B. (L.), 12. See also on this subject generally observations as to the doctrine of fraudulent preference, Chapter V., *post*.

(e) S. 37, Act of 1890—compare s. 6 (3), 32 & 33 Vict. c. 71, and s. 4 (d), 46 & 47 Vict. c. 52.

(f) See Victorian Statutes, vol. 7, pp. 199, 202.

## CHAP. IV.

Intention of  
debtor.

fact delayed (g). The Court, in ascertaining what the intentions of the debtors were, has to judge by their acts, and it is impossible to prove by positive evidence their intentions, which are shut up in their own minds. The Court would be paralyzed and the result would be ridiculous if it were to accept the mere statements of the debtors, their mere words and talk, as against their acts (h), and therefore where traders owed considerable debts and had no property in the colony except their business, stock in trade, and book debts, and sold the same for an amount sufficient to pay their debts and then left the colony without making any provision for their payment, but under no concealment, stating that they intended in a few months to return, the Court found that they intended the natural consequences of their act and left the colony with intent to defeat or delay their creditors (i). If a trader goes abroad and provides no means for paying bills of exchange which fall due in his absence he commits the act of insolvency (k); and if the necessary consequence of the departure is that his creditors must be delayed the debtor commits the act of insolvency, as where a foreign member of a firm who had purchased the assets and liabilities of the firm had visited Victoria and left the colony surreptitiously under fear of persons appointed to watch him by the creditors (l). The principle that the intent is rightly to be inferred from the consequence of the creditors being defeated and delayed, must at least be subject to certain limitations having reference to the relation in which the creditor stands to the debtor. The intent must exist, and the principle fully recognised as applicable to all cases is that it is for the petitioner to satisfy the mind of the Court. The case has to be proved (m). A debtor is not obliged to stay in the place because he is indebted. He can go abroad for a legitimate purpose, but if he fails to return as he professes, it does not by any means follow that a petition which charged him with absenting himself with a view to defeat or delay his creditors should fail, as the suspicions which such conduct occasioned would be justified, and the Court finding that it had been mistaken as to the object of the debtor in going, would, if

(g) *Robertson v. Liddell*, 9 East, 487 ;  
9 R.R., 596.

(h) *In re Dionisio*, 14 V.L.R., 336.

(i) *Ibid.*

(k) *Ex parte Kilner*, in *re Bryant*, 3

Mont. & Ay., 722.

(l) *In re Oppenheimer*, 3 A.J.R.,  
128.

(m) *In re Cabena*, 21 V.L.R., at p.  
293 ; 1 A.L.R., 45.

required, make an order that the affidavits on the file be used in CHAP. IV.  
a subsequent application (n).

An intent to defeat a single creditor is sufficient (o).

"*Being out of Victoria, remained out of Victoria.*"—A debtor left Victoria more than twelve months before the order *nisi*, and the act of insolvency alleged was that he had remained out of Victoria with intent to defeat and delay his creditors. It was found that he had appeared to have left Victoria to defeat his creditors, and had stayed for a year absent from the colony. The difficulty was whether his departure and absence being one continuous act, his departure more than a year since could be considered a continuing act from day to day, but, having regard to an English authority, the order was made absolute (p).

"*Departed from his dwelling-house.*"—The intent in this instance can be inferred in the same manner as in the cases on departing from the colony, and the petition must allege that the debtor departed from his dwelling-house with intent to defeat or delay his creditors, as such an omission is a matter of substance and not a mere formal defect, and cannot be cured by amendment (q). If the intent is established the act is complete at the instant of the debtor's departure from his dwelling-house (r), and the departure with the intent is sufficient although there has been no actual delay of any creditor (s). Where the alleged act of insolvency was that the debtor had "absented herself from her "dwelling-house with intent to defeat and delay her creditors," it was held the absenting need not be a corporeal or physical one. The debtor, previous to judgment, adopted an *alias*, and after the judgment removed, leaving no address, nor giving any to her solicitor; it was held that she had committed an act of

(n) *In re Cabena*, 21 V.L.R., at p. 293; 1 A.L.R., 45. *Vide also Re McKeand*, 6 Morrell, 240.

(o) *In re Rickards*, 5 A.J.R., 103.

(p) *In re Fyson*, 6 V.L.R. (I.), 19. The authority referred to was *Ex parte Bunny*, 1 De G. & J., 119; 26 L.J. Bk., 83. In this case the debtor went abroad with intent to delay his creditors, and remained abroad with the same intent, and a petition was filed more than twelve months after his leaving England, and the Court decided, as he had within twelve months

before the filing of the petition been remaining abroad with intent to delay his creditors, the adjudication was valid; the remaining abroad with intent to defeat or delay creditors being a continuing act of bankruptcy, whether the going abroad was or was not an act of bankruptcy.

(q) *In re McKeand*, *ante*; *Ex parte Coates*, in *re Skelton*, 5 Ch. D., 979. *See vide* p. 45 as to amendment.

(r) *Ex parte Gardner*, 1 V. & B., 45.

(s) *Rouch v. Great Western Railway Company*, 1 Q.B., 51.

**CHAP. IV.** bankruptcy (*t*). The fact of remaining from the house or place of resort is a continuing one, as it is in the case of a debtor remaining abroad (*u*).

The fact of a man not being present in his dwelling-house is "pretty good proof" of his having gone away, and the fact of his having gone away, leaving his debts unprovided for, is "pretty good proof" that he intends to defeat and delay his creditors, but in order to be absent he must be alive, and, notwithstanding the ordinary presumption in favour of life, the petitioning creditor who alleges that his debtor has committed an act of bankruptcy by departing from his dwelling-house with intent to defeat and delay his creditors, is bound to show that the debtor is alive and in some other place if there be doubt (*v*).

A debtor who has no settled house, but takes up a temporary abode at a public house in the place to which his business carries him, commits an act of insolvency by departing from such public house with intent to defeat and delay his creditors (*w*). If a debtor has a house belonging to him, but he has abandoned it as his dwelling-house, the house is not his "dwelling-house" within the meaning of the section (*x*). The right to return to the house does not make it his dwelling-house (*y*).

"*Otherwise absented himself*."—Cases under this part of the sub-section include generally any act done to avoid a creditor. A debtor who breaks appointments made with his creditors, with intent to defeat or delay, comes within this provision (*z*), but the mere failure to keep an appointment made with a creditor is not an act of bankruptcy (*a*). The failure contemplated is such as where a debtor upon applications made to him by creditors for payment of their debts, made appointments with them to meet him at specified times and places with reference to a settlement of their demands, but failed to keep them (*b*). There need not be a "departure" from the dwelling-house to comprise absenting under this proviso (*c*).

(*t*) *In re Alderson, ex parte Jackson*, (1895) 1 Q.B., 183; 1 Manson, 495.

(*u*) *Ibid.*

(*v*) *Ex parte Geisel, in re Stanger*, 22 Ch. D., 436-438.

(*w*) *Holroyd v. Gwynne*, 1 Rose, 113.

(*x*) *In re Nordenfeldt, ex parte Maxim, &c, Company*, (1895) 1 Q.B., 151; 2 Manson, 20.

(*y*) *Ibid.*

(*z*) *In re Jamieson, a'Beckett's Reserved Judgments*, 74.

(*a*) *Key v. Shaw*, 8 Bing., 320. *Vide* also *In re Locke*, 1 A.L.T., 112; and *Re Woolstenholme, ex parte Foster*, 4 Morrell, 258.

(*b*) *Russell v. Bell*, 10 M. & W., 340.

(*c*) *Deffe v. Desanjes*, 8 Taunt., 671.

“*Begun to keep house.*”—The denial to a creditor is necessary CHAP. IV. to complete the act of insolvency, and such is committed on the day of the denial, as where a debtor gave orders to be denied on one day but was not in fact denied till another (*d*). The denial may be to the authorised agent of the creditor as his clerk (*e*), and it may be an act that amounts to a denial, as in the case of a firm, the doors and windows of the place of business being closed and the customers unable to obtain admission, the jury finding that they are so closed to exclude the customers, and the partners remaining within, it is an act of bankruptcy by the partners by beginning to keep house (*f*). It therefore applies to a man's place of business, but the denial need not necessarily be at the place of business, it may take place at the debtor's lodgings or any other place where the creditor knows he may be found (*g*). A general order to be denied to all comers and a denial accordingly to some particular creditor is sufficient (*h*). There is no act of insolvency if the denial is at a late hour after retirement to rest (*i*), or on a Sunday at the debtor's appointment (*k*). It is apparently insufficient to merely ask for payment of the debt if the debtor denies himself. The creditor should ask to see him personally (*l*). The latter request is sufficient, even if money is not asked for, if the debtor who denies himself knows that the creditor has called or sent for the money due (*m*).

*That the debtor has filed in the prescribed manner in the Court* Act IV. *a declaration admitting his inability to pay his debts* (*n*).

The declaration must be dated and signed by the debtor, and be in the form in the schedule, with such variations as circumstances may require, and be witnessed by a chief clerk, a solicitor, or a justice of the peace (*o*). Where it is filed by a firm, it must contain the names in full of the individual partners, and if it is signed in the

The facts in this case were that two partners told their shopman they were going out to get some bills of exchange discounted, and directed him to make some excuse in case a creditor should call. On that day and the following day a creditor called when they were both at home and desired to see either one or the other of them, and the shopman denied them without being authorised by them so to do. It was held that the jury were warranted in concluding that they absented themselves with an intent to delay creditors

- (*d*) *Haickes v. Sands*, 3 Doug., 429.
- (*e*) *Hughes v. Gilman*, 10 Moore, 480.
- (*f*) *Cumming v. Bailey*, 6 Bing., 363.
- (*g*) *Park v. Prosser*, 1 C. & P., 176.
- (*h*) *Lloyd v. Heathcote*, 5 Moore, 129.
- (*i*) *Hughes v. Gilman*, ante.
- (*k*) *Ex parte and in re Preston*, 2 Rose, 21.
- (*l*) *Dudley v. Vaughan*, 1 Camp., 271.
- (*m*) *Hughes v. Gilman*, ante.
- (*n*) S. 37, Act of 1890—compare 32 & 33 Vict. c. 71, s. 6 (4); 46 & 47 Vict. c. 52, s. 4.
- (*o*) R. 165, Form 2.

**CHAP. IV.** firm's name (*p*), it must be accompanied by an affidavit made by the partner signing the declaration, showing that all the partners, or the greater number of partners, within Victoria concur in the filing of the same (*q*). It must set out that the debtor admits his inability to pay his debts, and must be filed with the chief clerk of the Court in the district in which such debtor might present a petition for sequestration (*r*).

The sub-section follows s. 6 (4), 32 & 33 Vict. c. 71, and a case decided under that Act states that the declaration is filed so as to constitute an act of bankruptcy when it is delivered to the proper officer at the proper office for that purpose with the intention that it should be filed (*s*). It is stated to be a substitute for voluntary sequestration, so that a debtor filing such a declaration would enable any creditor who wished it to procure a compulsory sequestration (*t*). The filing of a petition for liquidation by arrangement is not an act of insolvency within this sub-section (*u*).

Act V.

*That execution issued against the debtor on any legal process for the purpose of obtaining payment of not less than £50 has been levied by seizure: unless such process be bonâ fide satisfied by payment or otherwise within four days from the seizure. Provided a petition for sequestration be presented within twelve days from the seizure.*

The seizure.

The cases applicable to seizure by the sheriff are collected in Chitty's Archbold's Practice, 14th ed., p. 837. As to the County Court, *vide* Part II., Division 13 of the *County Court Act* 1890, and as to the Court of Petty Sessions, *vide* Part IV.,

Knowledge of the debtor.

Division 3, *Justices Act* 1890. Knowledge by the debtor of the seizure under the execution is not necessary to complete the act of insolvency under this sub-section (*x*). The amounts mentioned as recovered and levied for respectively must agree (*y*), that is, the writ of *fieri facias* must state accurately the amount due upon the judgment on which it is based, otherwise the non-satisfaction of it will not be an act of insolvency (*z*).

*Fi. fa.* must agree with judgment debt.

(*p*) *Vide* r. 285.

(*q*) R. 287.

(*r*) R. 165.

(*s*) *Ransford v. Maule*, 8 L.R. C.P., 672.

(*t*) *Re Smith*, 3 A.J.R., 17.

(*u*) *In re Smith*, *ante*.

(*x*) *In re Pedler*, 17 A.L.T., 46. *Sed vide Ex parte Blain*, in *re Savers*, 12 C.D., 522.

(*y*) *In re Wright*, 15 A.L.T., 190; *In re Tucker*, 13 V.L.R., 551.

(*z*) *In re Tucker*, *ante*.

An execution levied on the goods of partners, followed by their personal default in not paying, is all that is required in such a case, and thus when judgment was obtained against two partners comprising a firm in their trading name for a trade debt, and execution issued against them under that name was levied by seizure, and the process had not been satisfied, it was held that such amounted to an act of insolvency under this sub-section (a). It would be otherwise if the default were not a personal one of the partners, as an act of insolvency must be a personal act or default, and cannot be committed through an agent or firm as such (b).

CHAP. IV.

Partners.

The rule as to computation of time is that the number of days is to be reckoned exclusive of the first day and inclusive of the last day (c). A seizure was made on 30th August and the petition was presented on Monday, 12th September, and it was contended that under r. 4 of the *Insolvency Rules* 1890 the Sunday should not be counted, thus bringing the presentation of the petition within twelve days. It was held, however, that the petition was not presented within the time limited by the sub-section, as the rule only applied to computation of time in cases where such time was prescribed by the rules or by the practice of the Court, and not to the cases where the time was fixed by the Act itself (d). Rule 4 (a) 1898 in terms applies to the Acts, but in cases where the time is expressly fixed by the Acts, as in the present one, the rule would probably not be regarded. An objection that the order *nisi* should show on its face that it was not presented until four days after seizure was over-ruled (e), and an objection to the effect that under this sub-section the petition should be presented by the person issuing the execution was also over-ruled (f). Though the act of insolvency arises if the process be not satisfied within four days from the seizure the sheriff cannot sell until after eight days from the seizure, and is

Periods of time in this act of insolvency.

Petition under this sub-section.

(a) *Re De Beer Monte and Company*, 16 A.L.T., 160.

(b) *Ex parte Blain, in re Savers*, 12 Ch. D., 522.

(c) *Watson v. Issel*, 16 V.L.R., 607, over-ruling *In re Walker*, 15 V.L.R., 684.

(d) *In re —*, 18 V.L.R., p. 570. As to decisions to the same effect on other sections, see *In re Crisp*, 5 V.L.R. (L.), 1, as to sub-s. 6; *In re Counihan*, 8

V.L.R. (L.), 14, as to s. 45; *sed vide* s. 10 (3), Act of 1897, which provides that the Supreme Court or this Court may extend the time for doing any act or thing either before or after the expiration thereof; and see also "Time," Chapter II.

(e) *In re Hawkins*, 12 V.L.R., at p. 318.

(f) *Ibid*.

**CHAP. IV.** obliged to retain the proceeds for a further period of four days and to hand same to the assignee or trustee if a sequestration of the debtor's estate takes place within such time (g).

Retention of proceeds by sheriff.

Act VI.

*That the creditor presenting the petition has served in the prescribed manner on the debtor a debtor's summons requiring the debtor to pay a sum due of an amount of not less than fifty pounds, and the debtor has for the space of fourteen days succeeding the service of such summons neglected to pay such sum or to secure or compound for the same (h).*

No order can be made on this act of insolvency, if the debtor has applied for the dismissal of such summons, until after the hearing of the application, or where the summons has been dismissed, or during a stay of the proceedings therein (i); and it appears that the making of an order absolute does not affirm the existence of the debt, for if the insolvent has any grounds to dispute it he may thereafter do so in the Insolvency Court (k). On the return of the order *nisi* the onus of proving payment or composition lies on the respondent (l). The sufficiency of the debt can be inquired into on the return of the order *nisi* (m).

Time in sub-section.

So far as the computation of time in the sub-section goes, r. 4, of 1890, excluding a Sunday, was held not to apply (n).

Application for and form of summons.

A debtor's summons may be granted by the Court on a creditor proving to its satisfaction that a debt sufficient to support a petition for sequestration is due to him from the person against whom the summons is sought, and that the creditor has failed to obtain payment of his debt after using reasonable efforts to do so (o). The summons must be in the prescribed form (p). It must state that in the event of the debtor failing to pay the sum specified in the summons, or to compound for the same to the satisfaction of the creditor, a petition may be presented against him praying that his estate may be sequestrated. The summons must have an endorsement

(g) S. 76, Act of 1890.  
(h) Compare 32 & 33 Vict. c. 71, s. 6 (6), superseded in 46 & 47 Vict. c. 52, by the act of bankruptcy relating to non-payment by a debtor after service of a bankruptcy notice.

(i) R. 190.

(k) *In re Counihan*, 8 V.L.R. (I.),

14.

(l) *In re Crisp*, 5 V.L.R. (I.), 1.

(m) *In re McDonald*, 4 A.J.R., 184; 5 A.J.R., 42.

(n) *In re Crisp*, 5 V.L.R. (I.), 1. *Sed vide* p. 47 *ante*, "Time."

(o) S. 38, Act of 1890; r. 175.

(p) Schedule of Forms *post*, form 6.



CHAP. IV.

thereon to the like effect, or such other prescribed endorsement as may be best calculated to indicate to the debtor the nature of the document served upon him, and the consequences of inattention to the requisitions therein made (*q*), and a notice to the debtor that if he disputes the debt and desires to obtain the dismissal of the summons he must file an affidavit with the chief clerk within fourteen days stating that he is not so indebted or only so to a less amount than fifty pounds (*r*).

Notices thereon.

Where a company or co-partnership is duly authorised to sue and be sued in the name of a public officer or agent he may, as nominal petitioner for and on behalf of such company or co-partnership, sue out a debtor's summons against any debtor to such company or co-partnership on filing an affidavit that he is such public officer or agent and that he is authorised to sue out such summons (*s*).

The creditor must file an affidavit of the truth of his debt (*t*), but the proof of debt is not restricted to proof by the creditor on his own personal evidence (*u*), and the sufficiency of the facts upon which the summons may issue is in the discretion of the judge (*v*). The words "sufficient to support a petition for sequestration," apply to the amount of the debt irrespective of any securities held by the creditor, and it is not necessary for a secured creditor in order to obtain a debtor's summons either to realise or value his securities or to offer to give them up or have them valued (*w*), though he must do so in order to obtain an adjudication of sequestration (*x*).

The debt.  
Secured debt as to debtor's summons.

The creditor must also lodge the summons, together with two copies thereof and three copies of his particulars of demand (*y*). Unless the summons is lodged it may be set aside, and the application for that purpose can be made after the expiration of the fourteenth day (*z*). The particulars of demand must be expressed with reasonable and convenient certainty as to dates and all other matters, but no objection is allowed to the particulars

Particulars of demand.

(*q*) S. 38, Act of 1890.

(*r*) R. 180.

(*s*) R. 284.

(*t*) R. 176.

(*u*) *McDonald v. Lloyd*, 3 A.J.R., 43; and see s. 21, Act of 1890, and, in case of corporations, r. 284.

(*v*) *In re Lyon*, 4 A.J.R., 13.

(*w*) *In re Portch*, 7 V.L.R. (I.), 126.

(*x*) *Ex parte Mauritz*, in *re Giles*, 5 L.R., Ch. 779.

(*y*) R. 176.

(*z*) *In re Lawler*, 4 V.L.R. (I.), 8.

**CHAP. IV.** unless the Court considers that the debtor has been misled by them (a).

The chief clerk must seal the particulars, which are then deemed part of the summons (b), and the original summons must be filed and the copies sealed and issued to the creditor (c). The summons must have on it the name and place of business of the solicitor actually suing out the same, but in case no solicitor is employed for the purpose, then a memorandum expressing that the same has been sued out by the creditor in person (d).

Service of  
summons.

The summons must be personally served within twenty-one days from the date thereof by delivering to the debtor a sealed copy of the summons, but if personal service cannot be effected the Court may grant extension of the time for service, or if the Court be satisfied by affidavit or the examination of witnesses that the debtor has left Victoria, or is keeping out of the way to avoid such service, it may order service to be made by delivery of a sealed copy of the summons to some adult inmate at his usual or last known place of residence or business, or if such inmate will not receive the same, or if there be no such inmate, by affixing such copy upon some conspicuous place upon the premises, or it may order that a notice of the granting of the summons according to form No. 8 in the Schedule of Forms, *post*, be gazetted and advertised in a local paper, and that the publication of such notice in the *Gazette* and local paper shall be deemed to be service on the debtor on the seventh day after the last of such publications (e).

Service on firm.

The summons will be deemed to be duly served on all the members of a firm if it be served at the principal place of business of the firm in Victoria on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there (f).

Application to  
extend time for  
service.

An application for an extension of time for service must be either in print or manuscript or type-written, or partly in one or partly in another, and need not be supported by affidavit unless in any case the Court shall otherwise require (g).

(a) R. 177.

(b) R. 178.

(c) *Ibid.*

(d) R. 179.

(e) R. 187. For forms of notice in

papers, see forms 8 and 9, Schedule of Forms, *post*.

(f) R. 286.

(g) R. 189.

Service of the summons must be proved by affidavit, with a sealed copy of summons attached, and filed in Court (*h*); and when on the hearing of the order *nisi* the only evidence of service of the summons was an order of the judge refusing an application by the debtor to dismiss the summons and the debtor's affidavit filed and used on the occasion, such was held to be insufficient (*i*).

CHAP. IV.  
Proof of service.

If a person is aggrieved with the decision of the insolvency judge as to the sufficiency of the service, the remedy is by appeal, and not by prohibition (*k*). Where there is an order directing substituted service of the summons, the Supreme Court, it would seem, can go behind such order of the Insolvency Court and consider the validity of the service (*l*).

Any debtor served with a debtor's summons may apply to the Court in the prescribed manner and time (*m*) to dismiss such summons on the ground that he is not indebted to the creditor serving such summons, or that he is not indebted to such amount as will justify such creditor in presenting a petition for sequestration against him, and the Court may dismiss the summons with or without costs if satisfied with the allegations made by the debtor, or it may upon such security (if any) being given as the Court may require for payment to the creditor of the debt alleged by him to be due and the costs of establishing such debt, stay all proceedings on the summons for such time as will be required for the trial of the question relating to such debt (*n*).

Application to dismiss summons.

When the debtor disputes the debt and desires to obtain the dismissal of the summons he must file an affidavit (*o*) with the chief clerk stating that he is not indebted, or only so to a less amount than £50 (*p*). Where such an affidavit is filed the chief clerk fixes the time and place at which the application for the dismissal of the summons will be heard by the Court, and gives notice thereof to the creditor and debtor three days before the day so fixed (*q*).

Hearing of application to dismiss summons.

(*h*) R. 188. For form of affidavit, see form No. 7, Schedule of Forms, *post*.

(*i*) *In re Graham*, 4 A.L.T., 168.

(*k*) *Ex parte Levy*, 1 V.L.R. (L.), 271.

(*l*) *In re Arbuckle*, 23 V.L.R., at p. 247 (referring to *Ex parte Chatteris*, L.R. 10 Ch., 227); 19 A.L.T., 74; 3

A.L.R., 192.

(*m*) That is fourteen days. *Vide* r. 180.

(*n*) S. 38, Act of 1890.

(*o*) For form of affidavit, see form 10, Schedule of Forms, *post*.

(*p*) *Vide* r. 180.

(*q*) R. 181.

## CHAP. IV.

Dismissal of  
summons.

The grounds that can be urged for the dismissal of the summons are:—(1) That the debtor is not indebted to the creditor serving the debtor's summons. (2) That he is not indebted to such amount as will justify such creditor in presenting a petition for sequestration against him (*r*).

A motion was made to dismiss a debtor's summons on the ground that no debt was owing, the debtor being a partner in a Mauritius firm which had become insolvent, the creditor being aware of such and having received a dividend. It was decided that the matter should be sent to the Supreme Court for trial, proceedings on the summons to be stayed on the debtor giving security; as the probability of the debtor succeeding did not seem so great as that of the creditor succeeding, it was a proper case for security (*s*).

Form of order.

The form of order dismissing debtor's summons or staying proceedings is given in form No. 13, Schedule of Forms, *post*.

Bond upon stay  
of proceedings.

Where the proceedings are stayed upon security being given, if the debtor do not within the specified time enter into the bond to the creditor or other security required by the Court, the creditor is entitled to an order of the Court refusing the application of the debtor to dismiss the summons with costs (*t*).

An order was made by the Court on an application to dismiss a debtor's summons directing the debtor to give security, and if such security was given staying proceedings on the summons, but the order made no provision for the event of the security not being given, and did not reserve further directions or costs. No security being given within the time limited, the creditor, on notice to the debtor, obtained an order dismissing with costs the application to dismiss the summons. It was held that the Court had jurisdiction to make the order (*u*).

Continuance of  
proceedings.

When proceedings on a debtor's summons are stayed upon security given, the creditor must take or continue proceedings for the payment of the debt within twenty-one days from the date on which the security was completed, or if no such security

(*r*) S. 38, Act of 1890. *Vide In re McDonald*, 4 A.J.R., 184; 5 A.J.R., 42.

(*s*) *De Beer v. Desmazures*, 1 A.L.T., 120.

(*t*) R. 186. The forms of bond and of notice *re* sureties are given in forms No. 11 and 12, Schedule of Forms, *post*.

(*u*) *In re Fisher, ex parte Greenlaw*, 2 V.R. (I.), 26.

was ordered or given, then within twenty-one days from the date of the order staying proceedings on the summons, and must prosecute the same with effect and without delay, and if he fail to do so the debtor is entitled to have the summons dismissed with costs (v). Where the proceedings have been stayed pending the trial of the question of the validity of the debt the creditor or debtor may, after the proceedings in the trial of such question have terminated, set down the summons for further order of the Court on a day to be fixed by the chief clerk (w). Where such question has been decided against the validity of the debt the debtor, on production of an office copy of the judgment of the Court, is entitled to have the debtor's summons dismissed, and if the Court think fit with costs, but the order for costs cannot be enforced for seven days, or where the creditor has lodged a notice showing that he has taken the necessary steps to set aside the judgment, until after the final decision thereon (x). Where such question has been decided in favour of the validity of the debt, the creditor is entitled to an order of the Court refusing the application of the debtor to dismiss the summons, and if the Court think fit with costs (y).

CHAP. IV.

Proceedings after trial of validity of debt.

Dismissal of summons.

When result in favour of creditor.

*That the debtor has been adjudged or declared bankrupt or insolvent by any British Court out of Victoria having jurisdiction in bankruptcy or insolvency, and it shall not be necessary to produce any other evidence of such act of insolvency than a duly certified copy under the seal of the Court of the order or adjudication by which such person was declared or adjudged bankrupt or insolvent.*

Act VII.

This act of insolvency is based on s. 75, 24 & 25 Vict. c. 134, but the provision has been omitted from the later Acts. The High Court, the English County Courts and the Courts having jurisdiction in bankruptcy in Scotland and Ireland and every British Court elsewhere having jurisdiction in bankruptcy or insolvency act in aid of and are auxiliary to each other in matters of bankruptcy (z).

*When execution or other process issued on a judgment decree*

Act VIII.

- (r) R. 185.
- (w) R. 182.
- (x) R. 183.
- (y) R. 184.

- (z) 46 & 47 Vict. c. 52, s. 118. This matter, and the cases in respect to it are dealt with in Chapter I., "Auxiliary Jurisdiction."

CHAP. IV. *or order obtained in any Court in favour of any creditor in any proceeding instituted by such creditor is returned unsatisfied in whole or in part. Provided that the debtor has been called upon to satisfy such judgment, decree or order by the officer or other person charged with the execution thereof and has failed to do so (a).*

The judgment and judgment creditor under this sub-section.

It is immaterial whether the judgment is founded on contract or tort (b), and it is not necessary that the person instituting the proceedings should be a creditor before he instituted them, as he may have a mere claim for damages; but the creditor recovering the judgment must be the same person as the party who instituted the proceedings upon which the judgment was recovered, the words "by such creditor" being used to identify the person who instituted the suit with the person in whose favor the judgment was given (c), and the judgment returned unsatisfied must therefore, to constitute an act of insolvency under this sub-section, be one recovered in a proceeding "instituted" by a creditor (d). Consequently the non-satisfaction of an execution on a judgment for the defendant's costs on a non-suit is not an act of insolvency under this sub-section (e). The word "instituted" does not mean "originated," therefore the failure to satisfy an execution issued in the Supreme Court on a judgment recovered in the County Court and removed up is within the sub-section (f), and proceedings taken by the petitioning creditor to obtain a writ of *certiorari* to quash proceedings instituted by the judgment debtor in the Warden's Court are proceedings instituted by such creditor within the sub-section, and the non-satisfaction of a judgment for costs in favor of such creditor in such proceedings is an act of insolvency within it (g). The order *nisi* need not, however, state that the judgment was recovered in a proceeding instituted by the creditor, nor the nature of the debt for which the judgment was recovered (h); but where the order *nisi* omitted to state that the execution had been issued upon the judgment recovered

(a) Compare 5 Vict. No. 17, s. 5, and 28 Vict. No. 273, s. 13.

(b) *In re Allen*, 5 V.L.R. (I.), 25, and see *Re Sims, ex parte Demamiel*, 17 A.L.T., 230; 2 A.L.R., at p. 21; 21 V.L.R., at p. 632.

(c) *Ibid.*

(d) *In re Hollowood*, 6 V.L.R. (I.),

78; *In re Hall*, 13 V.L.R., 233.

(e) *In re Hollowood, ante.*

(f) *In re McNamara*, 10 V.L.R. (I.), 84.

(g) *In re Sims, ex parte Demamiel*, 17 A.L.T., 230; 2 A.L.R., 20; 21 V.L.R., 630.

(h) *In re Hall*, 13 V.L.R., 233.

by the petitioner it was discharged and amendment refused (*i*). CHAP. IV.  
 Though a defendant who has obtained judgment for his costs cannot found a petition for the sequestration of the plaintiff's estate upon it, inasmuch as the proceeding was not instituted by him, yet it has been pointed out if he sue upon it and recover a further judgment, even with the express object of taking advantage of this sub-section, he is at liberty to make the further judgment the foundation of such a petition (*k*). To constitute the act of insolvency it is not necessary that the judgment which the debtor has failed to satisfy should be a judgment for £50 or upwards (*l*), Amount of judgment. and the order *nisi* need not state the amount of the judgment (*m*). There is no necessary connection between the petitioning creditor and the creditor who obtains judgment (*n*), and therefore if A. Petitioner under this sub-section. gets execution and it is returned unsatisfied, B. may petition (*o*).

The execution or other process must be returned unsatisfied in Nature of return. whole or in part. A return which stated that the debtor had no personal property in the bailiwick but that he had pointed out real estate in the bailiwick, his interest in which the sheriff had advertised for sale but had been unable to sell in consequence of being ordered by the Supreme Court to return the writ, is bad, and the order *nisi* obtained on it was held to be improperly obtained (*p*). Where the return in the Supreme Court stated that the debtor had not any "goods and chattels" whereof the debt could be made, it was also held to be insufficient, and the order discharged (*q*). It is unnecessary to state in the return that the debtor was required to satisfy the writ; the return, on the other hand, would not be vitiated by its insertion (*r*). It is necessary that the order *nisi* under this sub-section should allege the execution to be returned, unsatisfied in whole or in part (*s*), but where the order *nisi* omitted to state that the execution was returned unsatisfied, the order was amended (*t*).

(*i*) *In re Levinson*, 1 A.L.R., 72.  
*Vide*, also, 21 V.L.R., 153; 17 A.L.T., 101.

(*k*) *In re Merry*, 13 V.L.R., 193.

(*l*) *In re Drouhet*, 10 V.L.R. (I.), 4.

(*m*) *In re Hall*, 13 V.L.R., 233.

(*n*) *In re Drouhet*, *ante*.

(*o*) *In re Hawkins*, 12 V.L.R., at p. 318.

(*p*) *In re Macpherson*, 10 V.L.R.

(I.), 1.

(*q*) *In re White*, 6 V.L.R. (I.), 50.

(*r*) *In re McConville*, 7 V.L.R. (I.), 17.

(*s*) *In re Cahill*, 1 A.L.T., 145.

(*t*) *In re Field*, 16 A.L.T., 162; questioned by *In re Levinson*, 21 V.L.R., 153; 17 A.L.T., 101; 1 A.L.R., 72. *Sed vide* p. 45 hereof as to effect of s. 10, Act of 1897.

**CHAP. IV.** There is now but one sheriff in Victoria and returns to process  
 Form of return. in the Supreme Court are made by him (u). The form of his  
 return to a writ of *fiery facias* runs:—

The within named [defendant or plaintiff] A.B. has no real or personal estate  
 whereof I can cause to be made the money within required or any part thereof  
 as I am within commanded.

The answer of

Sheriff.

The demand.

If the officer demands more than he is entitled to, the request  
 to point out is invalid (v), and the demand is equally invalid if the  
 writ of *fiery facias* state the amount less than the amount really  
 due (w). To make the demand good the writ of *fiery facias* must  
 accurately state the amount due upon the judgment on which it  
 is based (x). The demand is good though the officer claimed  
 the amount of the sheriff's fees and expenses endorsed on the  
 warrant if it is plain that the officer made a clear and separate  
 demand for the judgment debt and that the debtor was not  
 embarrassed by the further demand (y). The demand should be  
 a distinct request for present payment. The sheriff's officer in  
 giving time makes the demand ineffectual (z) and the officer should  
 make it clear that such a demand was made as would in fact  
 bring the debtor within the Act (a).

Officer or other  
 person charged  
 with the  
 execution.

Where the act of insolvency relied on was under this sub-  
 section it was held that the sheriff might appoint anyone to  
 execute writs for him (b). To make the act of insolvency com-  
 plete the officer or other person must be charged with the  
 execution of the writ of *fiery facias*, and consequently where the  
 writ was endorsed "the sheriff is not to levy but to make  
 "the usual demand with a view to insolvency," it was held that  
 there was no officer or other person charged with the execution  
 of the writ of *fiery facias* and therefore no complete act of insol-  
 vency (c). Where the order *nisi* alleged that the petitioner had  
 been informed and believed that A. was the officer charged with

(u) *Vide Supreme Court Act 1895*, ss.  
 9 and 11.

(v) *In re Morgan*, 2 W.W. & a'B.  
 (L.), 2.

(w) *In re Tucker*, 13 V.L.R., 551.

(x) *Ibid*; and *In re Wright*, 15  
 A.L.T., 190.

(y) *In re Sloes, ex parte Robison &c.*  
*Ltd.*, 19 V.L.R., 710; *In re New-*  
*ton*, 17 A.L.T., 90.

(z) *In re Fenner*, 7 V.L.R. (L.), 13;  
 and *vide In re Willison*, 4 V.L.R. (L.),  
 67.

(a) *In re Merry*, 13 V.L.R., at p.  
 199, commenting on *Re Whitesides*, 3  
 A.J.R., 115; and *vide Re Hodgson*, 5  
 A.J.R., 133.

(b) *In re Knowles*, 1 A.J.R., 105.

(c) *In re Field*, 17 A.L.T., 30.



the execution of the judgment and set out the act of insolvency **CHAP. IV.** it was held that the allegation was sufficient (*d*). It is the business of the officer to obtain payment of the money, and in the case of a respondent saying, "Come with me to my solicitor or "to such and such a bank and you will get paid," the officer is bound to go with him, but it is not his duty to attempt to sell mortgaged property (*e*).

A reasonable time must be allowed between the demand to satisfy the judgment and the presentation of a petition for sequestration of the debtor's estate (*f*). The time that should be allowed is not and cannot be fixed in any case. It must depend upon the circumstances of each particular case what time it is reasonable should be allowed to a debtor to pay. For instance, a reasonable time ought to be allowed to a debtor to convert any property he may have into money, or to raise money on it, so as to enable him to pay a money demand, and that time must, as previously stated, be determined by the circumstances of each particular case (*g*). If the officer meets the debtor in the street and demands satisfaction of the judgment, and receives an answer implying that the debtor has no means, he may make his return immediately, but if the debtor states he has means and will pay, a reasonable time must be afforded him (*h*), and if the opportunity of satisfying the writ is not given to the debtor there is no failure to satisfy, as when the debtor was met at 5 p.m. and stated to the officer, "I cannot pay you, but you know "I have a house full of furniture, and a library," and thereupon the officer made a return of *nulla bona* (*i*).

The debtor may by his conduct and words make a short period reasonable which under other circumstances would be unreasonable, and the right to a reasonable time may perhaps be waived by the words or conduct of the respondent (*k*). Where the debtor says, "I cannot satisfy the judgment, I "have no money," it is unnecessary for the officer to give any time to satisfy the judgment, but when the debtor expresses

(*d*) *In re Synnott*, 4 V.L.R. (1.), 89.

(*e*) *In re Douglas*, 12 V.L.R., 265.

(*f*) *In re Johnson*, 18 V.L.R., 788.

(*g*) *In re Merry*, 13 V.L.R., 202, 3.

(*h*) *In re Hodgson*, 5 A.J.R., 80,

133.

(*i*) *In re Elkington*, 13 A.L.T., 240.

(*k*) *In re Johnson*, 18 V.L.R., at p. 791.

**CHAP. IV.** his intention of satisfying the judgment, and asks for time to do so he should be given a reasonable time before the return is made, and if the same be not given the petition will fail (*l*).

Mental capacity of the debtor as to this act of insolvency.

A person cannot be made insolvent under this sub-section if he be unable mentally to understand what is going on, as in the case of a lunatic (*m*). The evidence in support of the objection of mental incapacity of the debtor should be clear and convincing. Proof almost to demonstration is required that at the time of the failure of the respondent to comply with the demands of his creditors he was in a state of complete mental incapacity, or that his non-compliance really arose from want of understanding (*n*). The opinion of several persons that the respondent is and was unfit to transact business, owing to his memory failing him, is therefore not sufficient (*n*).

As to defeating creditors.

The failure to satisfy a judgment does not necessarily defeat or delay creditors generally within the meaning of s. 41, Act of 1890 (*o*). On the contrary it has been said the non-payment of the judgment creditor may facilitate the payment of the other creditors (*p*).

Act IX.

*If at any meeting of creditors a debtor shall consent to present a petition under Part III. of the Act for the sequestration of his estate, and such debtor shall not within forty-eight hours from the date of his consenting as aforesaid present such petition he shall be deemed to have committed an act of insolvency on the expiration of such time; and if at any meeting of creditors a debtor shall admit that he is in insolvent circumstances, and he shall be then requested by a resolution of the majority of the creditors present at such meeting to surrender his estate under Part III. of the Act, and such debtor shall refuse, he shall thereby be deemed to have committed an act of insolvency.*

The meeting.

The sub-section is "very vague" (*q*) and the judge in the authority cited was not disposed to say what constitutes a sufficient meeting of creditors. In the case referred to a number of

(*l*) *In re Triado*, 18 A.L.T., 89.  
 (*m*) *In re Opitz*, 18 V.L.R., 35; 13 A.L.T., 169.  
 (*n*) *In re Newton*, 17 A.L.T., 90.  
 (*o*) *Re Martin*, 5 V.L.R. (I.), 13;

vide also *Re Carey*, 13 V.L.R., 161.

(*p*) *In re Carey*, ante.

(*q*) *In re Inglis*, 3 V.L.R. (I.), at p. 103.

creditors met at the house of the debtor, and asked him to furnish a list of his creditors and their debts, and he did so mentioning all those present and one creditor not there. The meeting then proceeded with the appointment of a chairman and passed resolutions indicating to the debtor the drift of the proceedings for the purposes of the Act. From such circumstances, and the debtor making no objection, the meeting was held to be sufficient (*r*). As to the first part of the sub-section the Act does not appear to make any formalities necessary, such as a chairman or a resolution. The meeting may assent silently to a question asked by one creditor (*s*). Secured as well as unsecured creditors have a right to be summoned and to be present and take part in the proceedings, but the fact that a debtor or his agent excludes a creditor who has a right to be present does not allow the debtor to take advantage of such an objection to prejudice the right of other creditors to have the estate sequestrated for an act of insolvency under this sub-section (*t*).

As to proxies, it has been doubted (*u*) if they can be used at a meeting under this sub-section. If they can be, evidence to make votes given under them count would be necessary if it had to be decided how a majority was (*v*). Proxies.

At a meeting the debtor was called upon to sequester his estate and consented to do so. After the meeting broke up, the debtor had a discussion with the chairman as to the costs of sequestration, stating that he had no funds for that purpose. There was no evidence of the exact nature or extent of such conversation, and the result was left in doubt. It was held that the debtor either consented or refused to sequester, and in either aspect he committed an act of insolvency. The debtor could have given material evidence, but did not do so (*w*). The consent.

The resolution under the second part of the sub-section is to request the debtor to surrender his estate under Part III. of the Act of 1890. It has been held that a request to the debtor to "file his schedule" is sufficient (*x*), and likewise a resolution The resolution.

(*r*) *Ibid.*

(*s*) *In re Smith*, 7 V.L.R. (I.), 4.

(*t*) *In re Clemes and Leach*, 2 V.L.R. (I.), 37.

(*u*) *In re Southey*, 5 V.L.R. (I.), 6.

(*v*) *Ibid.* As to proxies at meetings after sequestration, *vide* Chapter V., "Meetings of Creditors," *post*.

(*w*) *In re Inglis*, 3 V.L.R. (I.), 100.

(*x*) *In re Begbie*, 16 V.L.R., 757.

**CHAP. IV.** requesting the debtor "to put his estate in the Insolvency Court" is also sufficient (y). If the resolution passed is a valid one it cannot be neutralised by a subsequent change of opinion, as where a valid resolution having been passed, and the debtor's refusal given, some creditors left, and those who remained got into a discussion as to whether an assignment should be substituted for sequestration, and the majority preferring such, the assignment was subsequently made (z).

**The majority.** The majority of creditors under this sub-section means a majority in number and not in value (a). In order to maintain the act of insolvency in the latter part of the sub-section it must be clearly shown that before the meeting broke up there was a definite demand on the debtor to sequester and a definite refusal (b).

**As to defeating creditors.** The act of insolvency under this sub-section is not one the "natural consequence" whereof is to defeat or delay creditors (c), and cannot therefore be availed of to ground petitions under s. 41, Act of 1890.

**Act X.** *That the debtor has given or made any preference to or in favour of any creditor which would if the estate of such debtor were sequestrated under the Act be a fraudulent preference of such creditor.*

The question of fraudulent preference is fully discussed in Chapter V., *post*.

## 8.—THE ORDER NISI.

**The order nisi.** Any judge of the Supreme Court or of the Court may, upon proof of the essential contents of a petition to his satisfaction, by order *nisi* under his hand place the estate sought to be sequestrated under sequestration in the hands of one of the assignees (d), that is the assignee of the district in which the insolvent resides (e), until the said order be made absolute or discharged (d). A form of order *nisi* is given in form No. 18, *post*. The omission of the words "under sequestration" where they were necessarily implied by the other words of the order were considered not to be fatal (f).

**Form of order nisi.**

(y) *In re Southey*, 5 V.L.R. (I.), 4.

(z) *Ibid.*

(a) *Ibid.*

(b) *In re Webster*, 5 V.L.R. (I.), 16.

(c) *Vide in re Cohen*, 15 V.L.R., 664.

(d) S. 39, Act of 1890.

(e) *In re Hehir*, 12 A.L.T., 4.

(f) *In re Palmer*, 5 A.J.R., 157.

The petition and affidavits used for obtaining any such order *nisi* must, before the same is signed by the judge, be deposited with him or his associate (*g*), and all documents used for obtaining an order *nisi* from the Court of Insolvency, and the order *nisi* so obtained, must be deposited with the associate of the judge by whom the application for the order absolute is to be heard, before the hearing, for use thereat or on appeal (*h*). The rules of practice made by the judges of the Supreme Court in regard to the granting of orders *nisi* are followed by the judges of the Court of Insolvency (*i*). By s. 39 the order *nisi* must name a time when cause may be shown before the Supreme Court against the same being made absolute. Where the full Court was sitting and the order *nisi* could not be heard it was held that it could be heard upon the next day in which a judge was sitting in the Insolvency jurisdiction (*k*). The order *nisi* must, on its face, be made returnable to the Supreme Court. Where it was made returnable to "the Court," it in fact meant, by s. 4, Act of 1890, the Court of Insolvency, and as it was a matter that went to the jurisdiction it could not be amended by either the Court or the parties, and the order was consequently discharged (*l*). It must be made quite plain in the order *nisi* that the respondent should be made aware where he is to come and defend himself (*m*). The order must set out the nature and amount of the petitioning creditor's debt and the act or acts of insolvency relied on (*n*), and it should be headed "In the *Insolvency Acts*," and not "In the Supreme Court" or "In the Court of Insolvency" (*o*). The order should show to whom the petition was presented (*p*), and it should carefully recite the petition, and show that it is based on a petition (*q*). Where the security for the petitioning creditor's debt is land, it is unnecessary in the order *nisi* to accurately set out its description (*r*). The time of making the order and the date should be set out in it. This is a matter of practice, but if the time is not stated it has been held that such omission does not

CHAP. IV.

Lodgment of papers, &amp;c.

Practice, where order granted by insolvency judge.

Time for showing cause and return of order.

Contents of order.

Time and date.

(*g*) *Supreme Court Rules* 1884, r. 4.(*h*) *Supreme Court Rules* 1884, r. 6.(*i*) R. 170.(*k*) *In re M'Manomnie*, 1 W.W. & A'B. (I.), 53.(*l*) *In re Cohen*, 16 A.L.T., 103; *sed vide* s. 10 (2), Act of 1897, p. 45, *ante*.(*m*) *Ibid*.(*n*) S. 43, Act of 1890.(*o*) *In re Ryan*, 2 V.L.R. (I.), 83. *Vide also In re Cooper, ibid*; *In re Wolter*, 4 V.L.R. (I.), 75; and see form 18, *post*.(*p*) *In re Cooper*, 2 V.L.R. (I.), 82; *In re M'Conville*, 7 V.L.R. (I.), 17.(*q*) *In re Cooper*, 2 V.L.R. (I.), 82.(*r*) *Re Fitzgerald*, 14 A.L.T., 224.

**CHAP. IV.** invalidate the order (s). Where the copy order served was dated the 28th April, 1887, and the stamp bore the figures "29/4/87" and the initials of the associate, the Court held that, in the absence of anything to show that it was otherwise, it would presume that the associate had done his duty and cancelled the stamp immediately on signing the copy order *nisi* (t).

Registration by  
Registrar-  
General.

The party obtaining the order must forthwith lodge an office copy thereof with the Registrar-General, who must enter in a book, to be kept by him for that purpose, the name of the insolvent, his address and description, the date of the sequestration and the name of the assignee or trustee named in the order and every entry must be numbered consecutively (u).

Registration of  
order by sheriff.

The party obtaining the order must forthwith lodge an office copy thereof with the sheriff, who must register the same and note thereon the day and hour of its production (v); and the chief clerk must, upon the request of the assignee or any creditor, and upon payment of the sum of five shillings, telegraph to the sheriff notice that such order has been made (w), and when the order is made outside Melbourne the chief clerk must forthwith telegraph to the chief clerk of the Court at Melbourne that such order has been made (x).

Chief clerk to  
telegraph chief  
clerk at  
Melbourne.

Enlargement.

The Supreme Court may enlarge the order *nisi* from time to time as it may deem necessary for the purpose of service, and the order *nisi* may be enlarged where it cannot be served even though it has run out (y). Where an application was made on the return day for an enlargement of the order, which had been served on the respondent two days previously, the application was granted (z). The power, however, is discretionary, and will only be exercised where due diligence has been used (a). The order can only be enlarged by the Supreme Court, and a judge in Chambers has no jurisdiction to do so, s. 55 of the *Supreme Court Act* 1890 being confined to jurisdiction vested by that Act in the

(s) *In re Junner*, 14 A.L.T., 247.

(t) *In re Tucker*, 13 V.L.R., 551.

(u) R. 173.

(v) R. 174.

(w) R. 134.

(x) R. 133.

(y) S. 39, Act of 1890. *Re Arbuckle*, 23 V.L.R., 242, 247; 19 A.L.T., 74; 3 A.L.R., 192.

(z) *Re Parsons*, 7 V.L.R. (I.), 118; *sed vide re Arbuckle, ante*.

(a) *In re McPherson*, 1 A.L.T., 92; *In re Crofts*, 1 A.L.T., 112; *In re Doyle*, 10 V.L.R. (I.), 87. The order, it was held under 5 Vict. No. 17, would not without good grounds shown be enlarged "in hopes of a settlement" where the official assignee was not in

Supreme Court, which does not include the Insolvency jurisdiction (b). A form of order enlarging the order *nisi* is given in form No. 19, Appendix, *post*.

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Form of order enlarging.

Where the debtor opposes an enlargement he must take whatever preliminary objections he may have to the order *nisi*, otherwise when cause comes to be shown they will be deemed to be waived (c). The order enlarging may be signed by the associate (d). The meaning of the Supreme Court rule cited "is that the required authentication of the order having been made is the signature of the associate" (e), and the associate of the judge making an order enlarging the order *nisi* was permitted to sign such order at the hearing where it had been signed by another associate (e). Office copies of the order *nisi* for service made by a Supreme Court judge, or the order enlarging same, may be signed by the associate to such judge (f), and where the office copy of the order *nisi* bore the name of the associate, but it did not appear on the face of it that the person certifying was the associate, evidence was received at the hearing to show that such person was the associate of the judge who made the order *nisi* (g). Where the order *nisi* is made by a judge of the Court of Insolvency the copy must be signed or certified by a chief clerk (h), and it should be under the seal of the Court as well as verified or certified by a chief clerk (i). The office copy must include a copy of the signature of the judge making the order *nisi* (j).

Preliminary objections where debtor opposes enlargement.

Signing of office copies.

Every order *nisi* and any order enlarging the same must be served personally on the respondent by delivering to him an office copy thereof unless it be proved to the satisfaction of a judge of the Supreme Court or of the Court that the respondent

Service of order nisi and order enlarging.

possession. *In re Keighran*, 1 W. & W. (I.), 8. Under such circumstances, ss. 49 and 50 of the Act of 1890 bar an enlargement. In a later case, under 5 Vict. No. 17, it was intimated that a stricter practice would be observed as to enlargements (*In re Downie and Murray*, 1 W. & W. [I.], 102), and therefore an application to enlarge was subsequently refused where it was made on the ground that accounts were pending in the Master's office between the debtor and petitioning creditor, which, when completed, would show a balance due from the petitioning creditor; *In re M'Manomonie*, 1 W.W. & a'B. (I.), 53. An enlargement ought not to be

granted with a view to an arrangement with creditors without an affidavit that the petitioner was the only creditor, or that all the creditors consented; *Re McGrath*, 3 A.L.R., C.N., 37.

(b) *In re Arbuckle*, 23 V.L.R., 242; 19 A.L.T., 74; 3 A.L.R., 192.

(c) *In re M'Murrey*, 1 W. & W. (I.), 103.

(d) *Supreme Court Rules* 1884, r. 7.

(e) *In re Wolter*, 4 V.L.R. (I.), at p. 79.

(f) *Supreme Court Rules* 1884, r. 13.

(g) *In re Junner*, 14 A.L.T., 247.

(h) *Vide* r. 170 (2).

(i) S. 32, Act of 1890.

(j) *In re Hang Hi*, 4 A.J.R., 43.

**CHAP. IV.** is keeping out of the way to avoid service, or has left Victoria, in which case such judge may order that service of an office copy of the order *nisi*, or of any order enlarging the same, at the usual or last known place of abode or business of the respondent by delivering the same to some adult person resident thereat, or if such person will not receive the same, or if there be no such person, by affixing such copy upon some conspicuous place upon the premises, be deemed good service upon the respondent, and the judge may by such or any other order fix a time within which the respondent may file or post a notice of objection (*k*). Personal service of the order *nisi* may be made upon the respondent out of the jurisdiction, the provision as to substituted service being merely ancillary to the general rule requiring personal service (*l*).

Substituted service.

When respondent out of jurisdiction.

When respondent moving about.

Service on partners.

Form of affidavit of service.

Service in deceased person's estate.

As to application for substituted service.

If the debtor is moving about at a distance, the proper method, it has been held, of serving the order *nisi* is to send a person with the order on his track until he be served, and not to merely communicate with correspondents in towns in which the debtor may be (*m*). The service of the order *nisi* should be effected by a special messenger sent by the petitioner's solicitor. It is not the duty of the sheriff's officer to serve it (*n*). The order has been made absolute where only one of the partners has been served and no order for substituted service has been obtained in respect to the other partner (*o*). A form of affidavit of service is given in form No. 20, *post*.

As to service under s. 42, Act of 1890, and s. 113, Act of 1897, *vide ante*, at p. 95.

Before an order for substituted service (*p*) will be made, it must be shown that the respondent is keeping out of the way to avoid service, or has left Victoria (*q*). The order cannot be made part of the order *nisi* (*r*). The Court requires definite information of the respondent leaving Victoria, and an affidavit to the effect that six days after the order *nisi* was made the deponent went to respondent's residence and found him absent, and on

(*k*) S. 44, Act of 1890.

(*l*) *In re Thoneman*, 13 V.L.R., 162.

(*m*) *In re Finney*, 1 A.L.T., 129.

(*n*) *Re Doyle*, 10 V.L.R. (I.), 87.

(*o*) *Vide In re Martin*, 4 W.W. & A.B. (I.), 4; *In re Bell Bros.*, 18 A.L.T.,

233.

(*p*) *Vide supra*, as to order for substituted service.

(*q*) S. 44, Act of 1890.

(*r*) *In re Merriman*, 4 A.J.R., 31.



making enquiries ascertained that he was in New South Wales, **CHAP. IV.**  
 was held to be insufficient (s). The order for substituted service Order for substituted service.  
 should direct service at the last known place of abode (t), and not As to affidavit of service.  
 at any specified address. The affidavit of service must show a  
 strict compliance with the section (u) and with the order for  
 substituted service, and the means of knowledge of the person  
 effecting such service that the place at which service is directed  
 and made was the usual or last known place of abode or business  
 of the respondent (v). The section says "adult person resident  
 "thereat," and therefore "being thereat" is not a sufficient com-  
 pliance with the section (w). Where the service was effected on  
 the officer or messenger of the official assignee, who was the only  
 person on the premises at the last known place of business of the  
 insolvent, such officer having been in possession and resident there  
 for a week, such person served fulfilled all the requirements of the  
 order (x). As to the fact that the insolvent resides on the premises  
 where service was effected, the affidavit should be made on per-  
 sonal knowledge of the fact (y). A judge of the Insolvency  
 Court has jurisdiction to make the order for substituted ser- Form of order for substituted service.  
 vice (z). A form of order for substituted service of the order  
*nisi* is given in form No. 21, *post*, Appendix.

The time within which the respondent may file or post a notice Time for filing notice of objections where the service is substituted.  
 of objections should be fixed by the judge in the order for sub-  
 stituted service or in some other order (a). The order should not  
 fix an absolute time for filing notices of objection without having  
 regard to the time of effecting service of the order *nisi* (b), but  
 where the time has been absolutely fixed the order *nisi* is not on  
 that ground to be discharged, but it is a matter to be taken into  
 consideration by the Court in allowing further time to file the  
 objections (c). Where the order for substituted service omitted  
 to fix a time for filing or posting objections, notice of the same  
 was held to be unnecessary (d). On the same matter arising in  
 another case the order was enlarged a fortnight to enable

- (a) *In re Campbell*, 2 A.L.T., 4.
- (t) *In re O'Connor*, 4 A.J.R., 139;  
*In re Oppenheimer*, 3 A.J.R., 94.
- (u) S. 44, Act of 1890.
- (v) *In re Hayes*, 3 V.L.R. (I.), 98;  
*In re Rook*, 3 V.L.R. (I.), 107.
- (w) *In re Rickards*, 5 A.J.R., 103.
- (x) *In re Riordan*, 9 V.L.R. (I.), 1.
- (y) *In re Thomson*, 1 A.L.T., 123.
- (z) S. 44, *ante*; and *vide In re Oppenheimer*, 3 A.J.R., 94, 95.
- (a) S. 44, Act of 1890. *In re Stewart*, 2 V.L.R. (I.), 1.
- (b) *In re Hayes*, 3 V.L.R. (I.), 98.
- (c) *In re Wolter*, 4 V.L.R. (I.), 75.
- (d) *In re Rickards*, 5 A.J.R., 103;  
*In re Brown*, 3 A.J.R., 105.

**CHAP. IV.** objections to be filed (e). The order, on analogy to s. 46, was enlarged for one week where it had not been served on the respondent in time to give him four days to lodge objections before the rule was returnable, and was directed to be served on the respondent in the manner prescribed by s. 44 (f).

Amendment of  
order nisi.

As to amendment generally, see s. 31, Act of 1890, and s. 10 (2), Act of 1897. *Vide* Chapter II., "Amendment," at p. 43, *et seq.*, and see cases cited in foot-note where amendment of the order nisi has been granted or refused under the Act of 1890 (h).

Abandonment of  
order nisi.

If the proceedings are abandoned by the petitioning creditor, the respondent is entitled to come to Court and have the order

(e) *In re Stewart*, 2 V.L.R. (I.), 1.

(f) *In re Parsons*, 7 V.L.R. (I.), 118.

(h) The order nisi need not state that the judgment was recovered in a proceeding instituted by the creditor under s. 37 (8). If there was any doubt on the question, the Court in such a case would amend the order nisi; *In re Hall*, 13 V.L.R., at p. 238. The Court allowed an amendment on payment of costs of an error in a date in the order nisi which was traversed in the notice of objections (*In re Vagg*, 13 V.L.R., 172), and amended an order nisi by substituting "Huxtable" for "Henry," the second word in the respondent's name (*In re Perryman*, 16 V.L.R., 420), and an order was also amended where it was headed "In the Supreme Court" by striking out such words (*In re Ryan*, 2 V.L.R. [I.], 83, erroneously reported at 1 V.L.R. [I.], 4); and where the act of insolvency alleged was that contemplated by s. 37 (x.), to which were added the words, "as the above-named petitioners are advised," the order nisi was amended by striking such words out (*In re Dionisio*, 14 V.L.R., 326); and it was amended where it omitted to state that the execution was returned unsatisfied, s. 37, sub-s. 8 (*In re Field*, 21 V.L.R., 278; 16 A.L.T., 162), and where the order nisi stated that the assignee was "one of the assignees of insolvent estates for the Ballarat district, in the Southern Bailiwick," such being incorrect, but as the respondent was resident in the Ballarat district, as described, he could not be misled, and an amendment of such, if necessary, would be allowed; *In re Levinson*, 21 V.L.R., 153; 17 A.L.T., 101; 1 A.L.R., 72. Where the order nisi set out that the

act of insolvency had been committed six months before the presentation of the petition instead of within six months, the order was discharged, as it was not a case within s. 31 (*In re Reade*, 2 V.L.R. [I.], 83); and likewise where the order stated that the petitioner had been called upon to satisfy the judgment; *In re De Portue*, 4 V.L.R. (I.), 93. Where the order stated that the estate was vested "in the hands of an official assignee of the colony of Victoria," naming him, instead of in the hands of the assignee of the district in which the insolvent resided, no amendment was made; *In re Hehir*, 12 A.L.T., 4. The order nisi must on its face be returnable to the Supreme Court, and where it was made returnable to "the Court," which means by s. 4, Act of 1890 (unless the subject or context requires a different construction), the Court of Insolvency, amendment was refused, as it was a matter that went to the jurisdiction which neither the Court nor the parties could amend; *In re Cohen*, 16 A.L.T., 106. Where it did not appear in the order nisi that the judgment referred to therein was the same as that upon which the execution referred to was issued, the judgment was considered not to be sufficiently identified, and amendment refused; *In re Levinson*, 21 V.L.R., 153; 17 A.L.T., 101; 1 A.L.R., 72. Where the order nisi set out that the execution had issued on a judgment in the County Court at Shepparton instead of at Melbourne, it was held that there was no power to amend, as the misdescription was not a want of form or omission; *In re Hehir, ex parte King*, 23 V.L.R., 174; 19 A.L.T., 8; 3 A.L.R., 134.

discharged with costs, though costs up to the date of the intimation to abandon the proceedings have been tendered (*i*). CHAP. IV.

### 9.—OBJECTIONS.

Every respondent intending to oppose the order *nisi* being made absolute must within four days after the service of the order *nisi* or such further time as a judge of the Supreme Court may appoint (*k*), file in the office of the associate of the judge by whom the application to make the order absolute is to be heard (*l*), a notice in writing signed by him of his intention to oppose, that is when the residence of such respondent is within twenty miles of Melbourne, but when it is at a greater distance he must within the said time put into the nearest post office, addressed to the said associate, the like notice (*m*). The notice must state:—(1.) Whether he disputes the act of insolvency or the petitioning creditor's debt or both. (2.) Particulars of any special defence relied on by the respondent (*n*). Notice of the objections.

A form of notice of opposition is given in form No. 22, *post*. Form of notice.

Such notice is a waiver of all technical objections to the proceedings (*n*). In the case of *In re Levinson* (*o*), it is said that s. 45 imposes on a respondent the duty of judging his position as to whether he has a really good objection to the proceedings, and that it entitles him to say whether he will or will not lodge objections, and that further if he lodges objections he thereby waives his right to object to the sufficiency of the order *nisi*, and if he does not lodge his objections in regular time he waives all right to rely on any objections to the merits afterwards.

Leave to deliver the objections without the signature of the respondent when he resided out of the colony was given, but personal service in this case of the order *nisi* was dispensed with, as counsel appeared for the respondent to ask leave to deliver the objections without the respondent's signature (*p*). The provision requiring the signature to the notice was the 8th rule under the Act of 1865, which was held not to have the same Signature to the notice.

(i) *In re Blume*, 15 V.L.R., 812.

(k) S. 45, Act of 1890.

(l) R. 11, *Supreme Court Rules* 1884.

(m) S. 45, Act of 1890.

(n) *Ibid*.

(o) 21 V.L.R., 153; 17 A.L.T., 101.

(p) *In re Brann*, 3 W.W. & a'B. (I.), 6.

**CHAP. IV.** force as a section of the Act (*p*). The signature of the respondent is now required by the Act of 1890, but in cases where the service has been substituted service, and the respondent absent from the colony, the notice was allowed to be signed by a person other than the respondent, "and who appeared to be instructed more "than anyone else" to act on the respondent's behalf, as the Court desired to struggle against deciding adversely to an unheard respondent (*q*); and under similar circumstances the notice was allowed to be signed by any adult resident at the place where the substituted service was effected, even though such a person was in no way the agent of the respondent (*r*), as it is only consistent with common justice that people who obtain leave to attack absent persons upon serving a notice at a particular place should be obliged to meet any case the persons in that place may be able to bring forward (*s*).

Further time as to filing objections by respondent.

On an application to file *nunc pro tunc*, notice of objections to a petition where there has been an omission to file them at the proper time, the Court requires an affidavit stating that the objections are *bond fide*, and that the statements contained in them are true (*t*). In an earlier case it was stated that it would be a matter of course to grant further time if any explanation were given as to the cause of delay or as to merits (*u*). On an application for adjournment the affidavit in support should state that the objections on which the respondent relied were good (*v*), and it has also been held that in considering applications for leave to file objections *nunc pro tunc*, the objections ought to be looked at to see if they are *prima facie* good or such that they are likely to succeed, but they are not to be considered to ascertain whether they will succeed or not, as that is a totally different matter (*w*).

When the objections were filed a day too late they were not allowed to be used, as no materials were presented in support of the application the Court holding that it was too late at the hearing to make the affidavit or to allow oral evidence to be

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|---|---|
| ( <i>p</i> ) <i>In re Brann</i> , ante.                 | 6; <i>In re Triado</i> , 18 A.L.T., 89.             |
| ( <i>q</i> ) <i>In re Oppenheimer</i> , 3 V.R. (I.),    | ( <i>u</i> ) <i>In re Counihan</i> , 8 V.L.R. (I.), |
| 20.   | 14.   |
| ( <i>r</i> ) <i>In re Dionisio</i> , 14 V.L.R., 326.    | ( <i>v</i> ) <i>Re Fagan</i> , 9 A.L.T., 49.        |
| ( <i>s</i> ) <i>Ibid.</i>                               | ( <i>w</i> ) <i>In re Merry</i> , 13 V.L.R., at p.  |
| ( <i>t</i> ) <i>In re Fitzpatrick</i> , 10 V.L.R. (I.), | 195.  |

given (x), but when three out of four objections filed in pursuance of leave *nunc pro tunc* were verified, the fourth was allowed to be verified at the hearing (y). When the application for leave to file notice of objections is made by a person other than the respondent, but on his behalf, the same degree of strictness is not required, and it is not necessary to make an affidavit as to the truth of the objection (z).

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By persons other than respondent.

Where the facts are disputed or where there is an intention to set up facts by way of confession and avoidance as objections, the notice should contain such (a).

Nature of the objections.

The respondent may plead a set off in his notice of objections, and though the petitioning creditor's is a judgment debt the Court will inquire how much is due under it in order to ascertain whether it forms a sufficient petitioning creditor's debt (b). The set off cannot on the hearing be neutralised by the petitioning creditor setting up another debt due to him by the respondent (c). Until sequestration the right to set off does not arise to a contributory to a limited company in the event of it being wound up, and therefore if the company is endeavouring to sequester his estate for non-payment of calls he is not entitled to set off the debt due to him against the petitioning creditor's debt (d). Objections to the service of the order *nisi* were held to be waived by the notice of objections under the former Acts (e), unless such were taken in the notice (f). If the objection to the service is a "technical" one and the notice contains other objections such is waived (g). As to the respondent appearing at the hearing merely to object, *vide* "Hearing and Order Absolute," *post*.

Set off may be pleaded as an objection.

Objections as to the service.

Appearing at hearing to object.

Where the order *nisi* is all right on its face a preliminary objection as to the sufficiency of the materials upon which it is made will not be entertained, and where the preliminary objection was to the petitioning creditor's affidavit, as the date was omitted from the jurat, the judge thought it was a special defence

Preliminary objections.

- (x) *In re Clarton*, 4 V.L.R. (I.), 88.  
 (y) *In re Elkington*, 13 A.L.T., 240.  
 (z) *In re Dionisio*, 14 V.L.R., 326.  
 (a) *In re Reade*, 2 V.L.R. (I.), 83.  
 84.  
 (b) *In re Monks*, 12 V.L.R., 712.  
 (c) *Ibid.*  
 (d) *In re Sloss, ex parte Robinson Bros., Campbell and Sloss, Ltd.*, 19 V.L.R., 710; *In re Duckworth*, L.R. 2 Ch., 578; *In re Overend Gurney and Company (Grissell's case)*, L.R. 1 Ch., 528.  
 (e) *In re Harry*, 1 W. & W. (I.), 136; *In re Sanders*, 1 V.R. (I.), 2.  
 (f) *In re Newbigging*, 1 W.W. & A.B. (I.), 33.  
 (g) S. 45, Act of 1890.

CHAP. IV. of which notice should have been given, but formed no opinion as to the objection if it had been properly presented (*h*). Preliminary objections must be taken at the earliest opportunity, as, for instance, if the debtor opposes an enlargement of the order *nisi* it is necessary then for him to take them to avoid a waiver (*i*).

Recital in order  
*nisi* as to proof  
of allegations to  
judge's satisfac-  
tion.

The recital in the order *nisi* to the effect that the allegations therein are proved to the satisfaction of the judge making the order is not an idle form (*k*). It means that the judge has not assented to the prayer of the petition merely because it was verified by an affidavit, but that he is satisfied with the verification as the Act requires he should be (*l*). From a series of cases the rule has been laid down that where the order *nisi* is correct on its face, preliminary objections as to the insufficiency of the materials upon which it was granted cannot be taken, as, for instance, where the preliminary objection taken was that two of the affidavits deposing to the act of insolvency on which the order *nisi* was obtained contained erasures which had not been initialled by the commissioner before whom they were sworn (*m*). In the next case decided the preliminary objection raised was that the affidavit upon which an order was granted was informal, and it was held where an order *nisi* is granted rightly or wrongly the parties are put to litigation, and the case should be heard (*n*). In another case the preliminary objection was that the sheriff's officer's affidavit was defective, a blank being left for the word "warrant," and it did not state what was directed to the officer, and it was held that if an order *nisi* was correct on its face the Court would not go behind it, as it was no answer to say that the order was granted on insufficient materials (*o*). Later on it was urged by way of preliminary objection that the signature to the petition was incorrect, but the order *nisi* being correct, the Court would not look at the petition on a preliminary objection (*p*); and in *In re Fitzpatrick* (*q*), where no objection had been filed, the judge stated: "The only question open for discussion according to the

(*h*) *In re Ryan*, 7 V.L.R. (I.), 122. *Vide also In re Ritchie*, 8 V.L.R. (I.), 1.

(*i*) *In re M'Murey*, 1 W. & W. (I.), 103, decided under 5 Vict. No. 17.

(*k*) *In re Penglase*, 15 V.L.R., at p. 440.

(*l*) *Ibid.*

(*m*) *In re Gherson*, 2 W.W. & a.B. (I.), 14, distinguished. *In re Stephenson*, 1 W. & W. (I.), 114, as in the latter

case the defective affidavit was the one swearing to the petitioning creditor's debt.

(*n*) *In re Richmond*, 3 V.L.R. (I.), 109. *Vide also In re Tucker*, 13 V.L.R., 563.

(*o*) *In re Thomson*, 7 V.L.R. (I.), 146.

(*p*) *In re Ritchie*, 8 V.L.R. (I.), 1.

(*q*) 10 V.L.R. (I.), 6.

"cases which I have before decided, and the only question in this CHAP. IV.  
 "case open to any objection, is whether the rule *nisi* is right or  
 "not. I cannot now consider the statements made in the petition  
 "and affidavit. I think the order *nisi* is right on its face, and  
 "that there is sufficient evidence upon which to make it absolute."  
 In the case of *In re Dionisio* (*r*) several preliminary objections  
 relative to defects in the affidavits and petition were made, and  
 it was there decided that it was for the judge who accepted the  
 petition to say whether the allegations were sufficient to support  
 an act of insolvency, and which were, as the order stated, proved  
 to his satisfaction (*s*).

The notice of intention to oppose as contemplated by s. 45, <sup>Technical</sup> <sup>objections.</sup>  
 Act of 1890, waives all technical objections to the proceedings.  
 The decisions of the Court do not attempt to define a technical  
 objection. In an order *nisi* based on s. 37, sub-s. 8, the objection  
 that it was not stated therein that the execution mentioned was  
 issued on a judgment decree or order as set out in sub-s. 8 was  
 apparently treated as a technical objection (*t*), and an objection  
 that the 12th section of the *Stamps Statute* 1869 had not been  
 complied with because on the face of the copy order *nisi* served  
 the certificate of authenticity signed by the associate was dated  
 the 28th and the cancellation of the stamp the 29th, was regarded  
 as a strict technical objection (*u*). The objection that the debt  
 was not sufficiently set out in the petition was also regarded as a  
 technical objection, as also was an objection to the form of the  
 affidavit in support of a petition (*v*); on the other hand the objec-  
 tion that the wrong district was endorsed on the petition was held  
 not to be a technical objection (*w*).

#### 10.—THE HEARING AND THE ORDER ABSOLUTE.

Upon the day named in the order *nisi*, or on the day to which <sup>The hearing.</sup>  
 such order has been finally enlarged, the Supreme Court may  
 adjudge (*x*), and finally determine thereon or postpone the adjudi-

(*r*) 14 V.L.R., 326.

(*s*) *Vide also In re Junner*, 14 A.L.T.,  
 at p. 249; and *In re Fergie*, 24 V.L.R.,  
 at p. 419; 20 A.L.T., 170.

(*t*) *In re Levinson*, 21 V.L.R., 153;  
 17 A.L.T., at p. 101.

(*u*) *Vide In re Tucker*, 13 V.L.R., at  
 p. 553.

(*v*) *In re Wolter*, 4 V.L.R. (I.), 78;

*In re Fergie*, *ante*.

(*w*) *In re Platt*, 15 V.L.R., at p. 670.

(*x*) In 46 & 47 Vict. c. 52, s. 20 (1),  
 the expression is "shall adjudge," and  
 such has been held not to be an absolute  
 command so as to leave the Court no  
 discretion. *In re Thurlow*, 2 Manson,  
 158; (1895) 1 Q.B., 724.

**CHAP. IV.** cation and determination for such time as it may think fit, and upon the hearing of an order *nisi*, if the respondent do not appear or if the respondent appear and no notice of opposition has been given, the order *nisi* may be made absolute and the estate be adjudged to be sequestrated upon an affidavit of service of the order *nisi*, but if the respondent appear and notice of opposition has been given the proceedings upon the hearing are conducted in the same manner as nearly as may be as upon a trial at law, and the order *nisi* may be made absolute or discharged with or without costs as may be just, and whenever any such order *nisi* is discharged by the Court all questions affecting the property of the respondent or the validity of any transaction, deed, act, matter or thing relating thereto must be determined as if such order *nisi* had never been made (*y*). Where there are more respondents than one to an order *nisi* the Supreme Court may discharge such order as to one or more of them without prejudice to the effect of the petition as to the other or others of them (*z*). When an order *nisi* is made absolute, the associate must forward the order absolute to the chief clerk (*a*). If the respondent appear on the hearing merely for the purpose of objecting that the order *nisi* has not been duly served, and it appears to the Court that such order has not been duly served the order *nisi* should not be discharged, but the hearing may be adjourned subject to such directions and upon such terms as to costs or otherwise as the Court may think just (*b*). Materials should be placed before the Court to show that the service is bad and to rebut the affidavit of service. If *vivâ voce* evidence is to be relied on notice of intention to call such evidence should be given to the other side before the question of admitting it is considered. S. 46 does not contemplate *vivâ voce* evidence (*c*).

Effect of discharge on property.

Power to discharge order against some respondents only.

Order absolute to be sent to chief clerk.

Appearance to object to service.

Court may call petitioning creditor as a witness.

Strict proof of the act of insolvency is required, and the Full Court will not interfere with the primary judge's discretion in admitting evidence in any stage of the proceedings (*d*), and the Court has power on the hearing of a motion to set aside, annul, or discharge an order *nisi*, to call the petitioning creditor as a

(*y*) S. 47, Act of 1890—compare 28 Vict. No. 273, s. 21, and r. 37 of 32 & 33 Vict. c. 71.

(*z*) S. 110, Act of 1897—compare *Bankruptcy Act* 1883, s. 111.

(*a*) S. 47, *ante*.

(*b*) S. 46, Act of 1890.

(*c*) *Vide In re Clarton*, 4 V.L.R. (I.), at p. 89.

(*d*) *In re Hodgson*, 5 A.J.R., 133.



witness, and to obtain evidence from him of the whole transaction upon which the insolvency proceedings are based (*e*). CHAP. IV.

The associate of the judge to whom an application for an order *nisi* or an order absolute (as the case may be) is made may issue separate summonses for the examination of witnesses upon the hearing of such application (*f*). The form of summons to witness is appended to the *Supreme Court Rules* 1884, *post*. All documents used for obtaining an order *nisi* from the Court of Insolvency, together with the order *nisi*, must be deposited with the associate of the judge by whom the application for the order absolute is to be heard before the hearing for use thereat (*g*). All orders made by a single judge either in disposing of orders *nisi* or otherwise in insolvency may be signed by the associate of such judge (*h*). When the order *nisi* is made absolute and the petitioning creditor does not take out the same within one week, any person interested may apply by summons before a judge for liberty to take out the same, and the judge may direct accordingly and order the petitioning creditor to pay the costs and fees necessary for taking out the order and the costs of the application (*i*). When the order is made absolute, discharged or allowed to lapse, and there is no appeal or the appeal is disposed of, the associate of such judge who has the custody of the petition, affidavits and other documents used at the hearing, must forward the same to the chief clerk of the district Court of Insolvency to be filed in such Court (*k*). Though there may be several acts of insolvency set out in the petition and order *nisi*, and the order is made absolute on one ground only, it is unnecessary to specify the ground on which the order is made absolute. The practice is not to specify the ground nor to include preliminary recitals in the order (*l*). A form of order absolute is given in form No. 23, *post*, and a form of the order discharging the order *nisi* is given in form No. 24, *post*. The chief clerk must forthwith forward copy of every order of adjudication of sequestration to the Registrar-General for registration (*m*).

Summons to witness.

Deposit of documents.

Signature to orders.

Rule as to taking out order absolute if default made by petitioner.

Chief clerk of district to file papers.

Form of order discharging order *nisi*.

Chief clerk to forward copy of order absolute to Registrar-General.

(*e*) *In re Smart, ex parte Hill*, 20 V.L.R., 97.

(*f*) *Supreme Court Rules* 1884, r. 5.

(*g*) *Ibid*, r. 6.

(*h*) *Ibid*, r. 7.

(*i*) *Ibid*, r. 8. *Vide also* "Power of "Supreme Court to Change Carriage

"of Proceedings," Part 14 of this Chapter, *post*.

(*k*) *Supreme Court Rules* 1884, r. 9.

(*l*) *In re Dionisio*, 14 V.L.R., at p. 340.

(*m*) S. 20, Act of 1890; as to the term "forthwith," see Chapter III.,

**CHAP. IV.** The order absolute can be amended (*n*). The Supreme Court has inherent power to vary or amend an order absolute when it has been drawn up and signed in such a manner as to make it a different order from that which the Court intended to pronounce (*o*).

Amendment and variation of order absolute.

Discretion of Court to make rule absolute.

Two orders *nisi*.

Filing of schedule when order made absolute.

Respondent's remedy if petition unfounded or malicious.

Though the statutory requirements exist, the Court will not, in its discretion, necessarily make the order absolute, as, for instance, if the petitioning creditor's motive be an improper one (*p*). Where there are two orders *nisi* by different creditors against the same respondent, and the one prior in date has been made absolute, the Court will refuse to make the other absolute (*q*). Within one week after adjudication of sequestration, or such further time as the judge of the Court of Insolvency or chief clerk may allow, the insolvent must file his schedule in the office of the chief clerk, verified as in the case of a voluntary sequestration, and the judge or chief clerk may dispense with any portions of such schedule, as in the case of voluntary sequestration, upon such terms (if any) as he may think fit, and the insolvent must also within the said time file an affidavit containing the particulars mentioned in rule No. 166 (2) and (3) (*r*). This provision applies also to persons who have previously filed voluntarily and are undischarged (*s*).

If it appears upon the hearing of the order *nisi* that the petition for sequestration was unfounded and vexatious or malicious, the Supreme Court may allow the respondent on his application for the same, then or at some other time to be named by it, to prove any damage alleged to have been by him sustained thereby, and may award him damages not exceeding £250, as it deems fit, and compel payment of same by summary process, or it may leave him to his action for the said injury (*t*). An action lies against persons who petition without reasonable and probable cause, and knowingly and wilfully or recklessly swear to depositions false in fact. The proceedings should be set aside or the order *nisi* discharged before the commencement of the action,

at p. 72, *ante*. As to the entries to be made by the Registrar-General, *vide* r. 173.

(*n*) S. 31, Act of 1890; and *vide* s. 10 (2), Act of 1897.

(*o*) *In re Dionisio*, *ante*.

(*p*) *Vide* p. 83, *et seq.*, *ante*.

(*q*) *In re Rigg*, 4 V.L.R. (I.), 20.

(*r*) R. 171.

(*s*) *In re Miller*, 4 A.J.R., 122.

(*t*) S. 48, Act of 1890—compare 5 Vict. No. 17, s. 27; 28 Vict. No. 273, s. 22.

but such does not of itself establish a want of probable cause, and the plaintiff must give some *prima facie* evidence of want of probable cause in order to put the defendant upon proof of the existence of probable cause (*u*). If the adjudication has not been set aside, the action may be summarily dismissed upon summons as frivolous and vexatious (*v*). When a man is falsely and maliciously made insolvent, two kinds of injury are inflicted upon him: (1) The expense of getting rid of the insolvency; (2) injury to fame and credit (*w*).

The creditor on whose petition any order *nisi* for sequestration is made must, at his own cost, prosecute all the proceedings in the sequestration until after the close of the meeting for the election of trustee, and the same, when taxed, are directed to be reimbursed to him by the assignee or trustee out of the first moneys received; and the costs incurred under any sequestration are paid out of the insolvent estate (*x*). As to taking out order absolute, *vide* ante at p. 145; and as to petitioning creditor's and respondent's costs, *vide* Chapter II., at p. 54, *et seq.*

Duty of petitioning creditor in a sequestration.

Petitioning creditor's and respondent's costs.

# 11.—APPEAL.

The order absolute is dealt with by a single judge sitting as the Supreme Court (*y*), and the right of appeal from the order is founded on s. 37, *Supreme Court Act* 1890. Order 58, r. 1, of the *Supreme Court Rules* (Judicature), provides mode of appeal from any order, and the same order, r. 9, combined with r. 15, fixes the time for appealing in insolvency matters, such time being within fourteen days from the time at which the order is signed, entered or otherwise perfected, or in the case of a refusal of an application from the date of such refusal, as in the case of a discharge of the order *nisi*.

Time for appealing.

Special leave to appeal when the time limited for appealing has expired will be granted by the Full Court if justice requires that such leave should be given, but the Court insists on the limita-

Leave to appeal after expiration of time.

(*u*) *Brown v. Chapman*, 3 Barr., 1418; 1 W. Bl., 427; *Johnson v. Emerson*, L.R., 6 Ex., 329; *Hay v. Weakley*, 5 C. & P., 361.

(*v*) *The Metropolitan Bank Ltd. v. Pooley*, 10 App. Cas., 210; *Whitworth, v. Hall*, 2 B. & Ad., 695, approved.

(*w*) *Quartz Hill G.M. Co. v. Eyre*, 11 Q.B.D., at p. 683.

(*x*) S. 40 Act of 1890—compare 28 Vict. No. 273, s. 17; 32 & 33 Vict. c. 71, r. 31; 6 Geo. IV. c. 16, s. 14.

(*y*) S. 39, Act of 1890.

CHAP. IV. tion that it will see that the person against whom the leave to appeal is sought has not been induced, by the appeal not having been brought in time, to alter his position to his detriment, and will always protect persons so placed by, for instance, requiring an undertaking from the party desirous of appealing, to indemnify the successful party in the Court below against the consequences of any act which may have been done by such party on the faith of the judgment not having been appealed from within due time (z).

Signing of  
orders on appeal.

All orders of the Full Court upon appeal are signed by the chief clerk thereof (a).

#### 12—REVIVAL OF ORDER NISI.

Power of Court.

If after any order *nisi* has been made for the sequestration of an estate the debt of the petitioning creditor be found insufficient to entitle such creditor to apply for and obtain such order *nisi*, or if such order *nisi* is discharged or allowed to lapse in consequence of the consent or default of the petitioning creditor or his collusion with the insolvent, the Supreme Court, or any judge thereof or of the Insolvency Court, may, upon the application of any other creditor whose debt amounts to the value of £50 and has been incurred prior to the order *nisi*, and upon proof thereof to the satisfaction of the said Court or judge, order that the sequestration be revived and be proceeded in as if it had been originally obtained on the petition of the last-named creditor, and thereafter the sequestration is revived with all the consequences and effects thereof as if the order *nisi* had not been discharged or allowed to lapse (b). Revival of the proceedings therefore depends upon the happening of any of the following events:

Requirements  
for revival.

—(1) That the debt of the petitioning creditor is found to be insufficient to enable such creditor to apply for and obtain such order *nisi*; (2) that the order *nisi* has been discharged or allowed to lapse in consequence of the consent or default of the petitioning creditor; (3) the petitioning creditor's collusion with the insolvent. It is sufficient to prove any one of these essentials,

(z) *Wyburn v. The Corporation of Canterbury*, 19 V.L.R., 302-318.

(a) *Supreme Court Rules* 1884, r. 7.

(b) S. 49—compare 5 Vict. No. 17, s.

28, and 28 Vict. No. 273, s. 23. *Vide* also "Power of Supreme Court to "change Carriage of Proceedings," *post*, at p. 150.

therefore it is sufficient if a mere default is proved (c). "Consent" relates to an express consent; "default" relates to not applying to enforce the order *nisi*; "collusion" applies to a case in which there is all the semblance and appearance of supporting the order, but only a colourable and not a real support (d). It is not necessary, however, that the creditor applying to revive should prove that the original petitioning creditor's debt was a good one, as one of the alternatives on which the sequestration may be revived is when the original petitioning debt is insufficient, and therefore, although the first petitioning creditor's debt may not be a good one, another creditor having a sufficient debt of his own may revive (e). Proof, however, must be given of the insolvency in other respects, and the reviver must prove his own to be a good petitioning creditor's debt (f).

CHAP. IV.

Evidence.

The creditor applying to revive presents a petition reciting the previous petition, the order *nisi* and the lapsing or otherwise of such order (g). The rules of the Supreme Court in respect to compulsory sequestrations should be followed (g). The order reviving the sequestration should also disclose jurisdiction on its face, and where it failed to show that the respondent was indebted to the petitioner before the order *nisi* was obtained or at all, it was discharged, and such a defect it was held could not be amended under s. 31, Act of 1890 (h).

Recitals in petition.

Rules to be followed.

Order reviving must show jurisdiction on its face.

If the order *nisi* taken up is based on sufficient materials in fact, the creditor seeking a renewal of the sequestration ought not to be defeated by a defect in the original petition (i). It is unnecessary to give any notice of the proceedings to the original petitioning creditor (k). The debt of the creditor seeking a revival must have been incurred prior to the order *nisi* (l); but it need not have been incurred prior to the act of insolvency relied on (m). The fact that certain applicants fail to obtain an order reviving the sequestration because they were not creditors entitled to take up the proceedings is no bar to a creditor subse-

Defect in original petition immaterial.

Notice to original petitioner unnecessary.  
Debt of reviving creditor.

Failure of applicant no bar to others.

(c) *Ex parte Staughton, in re Hewitt*, 1 W.W. & a'B. (I.), at p. 21.

(d) *Ibid.*

(e) *Ibid.*, at p. 22.

(f) *Ibid.*

(g) *Vide In re Penglase*, 15 V.L.R. 434, at p. 441.

(h) *Ibid.*, 434. *Sed vide* s. 10 (2), Act

of 1897, at p. 45 hereof.

(i) *Ex parte Jones, in re Butchart*, 2 W.W. & a'B. (I.), 8.

(k) *Ex parte White, in re Hewitt*, 1 W.W. & a'B. (I.), 24.

(l) S. 49, Act of 1890.

(m) *Ex parte White, in re Hewitt, ante.*

**CHAP. IV.** quently to such failure applying for a revival (*n*). The word "superseded" occurs in the marginal note to s. 49, but it does not occur in the section, and it may be stated this note is the same as that in the Act of 1865, the provision in which Act (*o*) contains the words "If such order shall be superseded." In the present Act the words, "if such order *nisi* shall be discharged or "allowed to lapse" are substituted for the others. It was held that if by the default of the parties no order was made upon the order *nisi* it was superseded, and no order dismissing or superseding it was necessary (*p*).

The word  
"superseded."

### 13.—ACT OF INSOLVENCY UNDER S. 50, ACT OF 1890.

Payments to  
petitioner after  
order *nisi*.

New act of  
insolvency.

Fraudulent  
nature.

If a person against whom an order *nisi* for sequestration has been made pay any money to the person who obtained the same or anyone on his behalf, or give or deliver to any such person any satisfaction or security for his debt or any part thereof, such payment, gift, delivery, satisfaction or security is a new act of insolvency upon which a petition for sequestration may be presented, and every person so receiving such money, gift, delivery, satisfaction or security has to deliver up such security and repay or deliver the said money or gift, or the full value thereof, to the assignee or trustee of the insolvent's estate for the benefit of the creditors of such insolvent, and to pay all the costs incurred by any other creditor in obtaining the revival of the sequestration (*q*). The payment of money in such circumstances, as for instance for a consent to an adjournment, has been denounced as a fraud on the other creditors, and a transparent one on the bankruptcy laws (*r*), and it is in effect a common law fraud to make a payment contrary to the bankruptcy laws (*s*).

### 14.—POWER OF SUPREME COURT TO CHANGE CARRIAGE OF PROCEEDINGS.

If the petitioner, after presentation of the petition, does not proceed with due diligence the Supreme Court may substitute as

(*n*) *Ibid*, at p. 26.

(*o*) S. 23.

(*p*) *In re Von der Heyde, ex parte Levi*, 2 W.W. & a.B. (I.), 28.

(*q*) S. 50, Act of 1890—compare 5 Vict. No. 17, s. 29; and 28 Vict. No. 273, s. 24.

(*r*) *Vide In re and ex parte Atkinson*, 9 Morrell, 197; and *In re and ex parte Otway*, (1895) 1 Q.B., at 814; 2 Manson, 174.

(*s*) *Re Badham, ex parte Palmer*, 10 Morrell, at p. 257.

petitioner any other creditor to whom the debtor may be indebted in the amount required by the Insolvency Acts in the case of the petitioning creditor (*t*). This power cannot be exercised after the expiration of the statutory period for presenting a petition has elapsed, unless perhaps fraud is alleged, as otherwise the effect would be to extend the time for filing petitions (*u*). CHAP. IV.

#### 15.—POWER OF SUPREME COURT TO STAY PROCEEDINGS.

The Supreme Court may at any time, for sufficient reason, make an order staying the proceedings under an insolvency petition, either altogether or for a limited time, on such terms and subject to such conditions as to it may seem just (*v*). To give effect to this provision a liberal construction must be given to the words used (*w*). The words used are "under an insolvency petition," but it has been held that after the order *nisi* is signed the proceedings are under it and not under the petition (*x*). The application for the order *nisi* is a proceeding under the petition, and can therefore be stayed under the provision (*y*).

#### 16.—DEATH OF DEBTOR—CONTINUANCE OF PROCEEDINGS.

If a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter are continued, unless the Court otherwise orders, as if he were alive (*z*). Where a debtor died after the petition was presented, but before service upon him, all further proceedings on such petition were stayed, as they could not go on without either personal or substituted service, neither of which could be effected, as the debtor being dead there could not be personal service, nor therefore substituted service, as the latter means service that is substituted for a possible personal service (*a*). Under the Act of 1890, if the insolvent died after adjudication of sequestration, the sequestration

*a* Death of debtor before service.

Meaning of substituted service.

(*t*) S. 107, Act of 1897—compare *Bankruptcy Act* 1883, s. 107; and *vide* judgment of Lord Cairns *In re Bristow*, L.R. 3 Ch., 247.

(*u*) *In re and ex parte Maugham*, 21 Q.B.D., at p. 23. *Vide* also *Ex parte Maund*, (1895) 1 Q.B., p. 198.

(*v*) S. 108 (2), Act of 1897—compare *Bankruptcy Act* 1883, s. 109; and *vide* *Re Artola Hermanos, ex parte Chdle*, 24 Q.B.D., 640.

(*w*) *Union Bank of Australia Ltd. v. Dean*, 20 A.L.T., 98; 24 V.L.R., 453.

(*x*) *Ibid.*

(*y*) *Ibid.*

(*z*) S. 108 (1), Act of 1897—compare s. 108, *Bankruptcy Act* 1883; and *vide* *Re Walker*, 3 Morrell, 69; *Re Hardy*, (1896) 1 Ch., 904.

(*a*) *In re Easy, ex parte Hill*, 4 Morrell, 281-2; 19 Q.B.D., 538.

CHAP. IV. after notice given to such persons as the Court might think fit was proceeded in as if such insolvent were living (b), but the order *nisi* abated on the death of the respondent before adjudication of sequestration and could not be renewed or proceeded with against his representatives (c).

(b) S. 130, Act of 1890—compare 32  
& 33 Vict. c. 71, s. 80 (9); 12 & 13  
Vict. c. 106, s. 116.

(c) *In re Mann*, 1 W. & W. (L.),  
103.



## CHAPTER V.

### ADMINISTRATION OF ESTATE.

#### DIVISION 1.

- |   |  |
|---|--|
| 1. <i>Meetings of Creditors, Proxies, and Voting.</i> | 4. <i>The Official Accountant.</i>     |
| 2. <i>The Assignee.</i>                               | 5. <i>The Committee of Inspection.</i> |
| 3. <i>The Trustee.</i>                                | 6. <i>The Police Magistrate.</i>       |

#### DIVISION 2.

- |  |  |
|--|--|
| 1. <i>Vesting of Estate.</i>   | (d) <i>Fraudulent preferences of Property.</i>   |
| 2. <i>Property divisible amongst creditors and incidents thereto.</i>  | <i>Class II.—As to the capacity to exercise and to take proceedings for exercising all such powers over or in respect to Property as might have been exercised by the Insolvent for his own benefit.</i> |
| <i>Class I. (a)—As to Property that may belong to or be vested in the Insolvent at the date of the Order of Sequestration or may be acquired by or devolve on him before he obtains his Certificate.</i> | <i>Class III.—As to Property the subject of reputed ownership.</i>   |
| (b) <i>Conveyances of Property which are acts of Insolvency.</i>   | 3. <i>Property not divisible amongst creditors and incidents thereto.</i>  |
| (c) <i>Voluntary and Fraudulent Settlements of Property.</i>   | 4. <i>Actions, effect of sequestration on same.</i>  |

#### DIVISION 3.

*Proofs of Debt.*

#### DIVISION 4.

*Distribution of Estate: Books, Accounts, and Audit.*

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#### DIVISION I.

##### 1. MEETINGS OF CREDITORS, PROXIES, AND VOTING.

Meetings of creditors in insolvency are held after sequestration, with the exception of the meeting referred to in s. 37, sub-s. IX., Act of 1890. Under s. 53 of that Act it is the duty of the chief clerk to cause notice of the meeting to be given in the *Government Gazette* or in any mode prescribed by the rules, and thereby

*General meetings.*

*Convening of meeting under s. 53, Act of 1890.*

**CHAP. V.** appoint a time and place for the meeting (*a*). The meeting must be summoned for a day not later than fourteen days from the date of the order of sequestration, unless the Court fixes a later day (*b*). Where a meeting was delayed in consequence of the act of the Court, the election of the trustee thereunder was held valid, as the rule is merely directory (*c*).

Time of holding.

The chief clerk summons the meeting by giving not less than seven days' notice of the time and place thereof in the *Government Gazette*, and in one of the Melbourne daily newspapers, and also in some local newspaper if the proceedings are not being prosecuted in Melbourne (*d*).

Advertisement of meeting.

The official assignee must send a notice in the form No. 41 of the Appendix, *post*, with such variation as circumstances may require as to the time and place of meeting, as soon as practicable to the official accountant and each creditor mentioned in the debtor's schedule, but the proceedings at such meeting are not invalidated by reason of any such notice not having been sent or received before the meeting (*e*). In the case of a firm the joint and separate creditors must collectively be convened to the meeting (*f*).

Notice to official accountant and creditors.

The chief clerk acts as chairman (*g*).

Chairman.

The chief clerk may adjourn the meeting from time to time until any disputed proof is finally rejected or admitted; objection to a creditor's proof can be taken at any time before he has signed the resolution (*h*). The chief clerk has power to grant an adjournment of a general meeting in order that creditors who have filed informal proofs of debts may be enabled to amend them (*i*), and he may adjourn the meeting pending the decision of a judge to whom he has referred a matter of which he is doubtful under r. 123 (*k*).

Adjournment of meeting when proof disputed.

The assignee, or, if he cannot conveniently, some other person authorised by writing under his hand, must attend the meeting and produce the proofs of debt delivered to or sent to him (*l*).

- (a) S. 53, Act of 1890; r. 257.  
 (b) R. 254.  
 (c) *In re Cotton, ex parte Clarke*, 6 V.L.R. (I.), 33.  
 (d) R. 255.  
 (e) R. 256.  
 (f) R. 289.

- (g) R. 257.  
 (h) R. 258; *Re Snell*, 6 A.L.T., 61.  
 (i) *Re McInerny*, 4 A.L.T., 16.  
 (k) *In re Reuter*, 4 A.J.R., 143. *Vide* also r. 278 as to adjournment by chairman.  
 (l) R. 259.

General meetings may be held in the prescribed manner and CHAP. V.  
 subject to the prescribed regulations as to the quorum, adjourn-  
 ment of meeting, and all other matters relating to the conduct of  
 the meeting, or the proceedings thereat (*m*). The assignee or  
 trustee may at any time call a general meeting of the creditors,  
 and the trustee must call such meeting when required by any  
 creditor with the concurrence of one-sixth in number or value  
 of the creditors, including himself, who have proved their debts (*n*),  
 and it is his duty to summon meetings at such times as the creditors  
 by resolution, either at the meeting appointing the trustee or  
 otherwise may direct (*o*), or whenever directed by the Court (*p*).  
 When any creditor, with the concurrence of one-sixth of the  
 creditors in number or value who have proved (including him-  
 self), at any time requests the trustee to summon a meeting of  
 the creditors, the trustee must summon such meeting accordingly  
 within fourteen days (*q*). The person at whose instance the  
 meeting is summoned must, on making such request, deposit with  
 the trustee a sum sufficient, in the opinion of either the trustee or  
 the chief clerk, to pay the costs of summoning the meeting, and  
 such sum has to be repaid to him out of the estate, if the creditors  
 or the Court so direct (*r*). The meeting held for the purpose of  
 filling up a vacancy in the office of a trustee is summoned by the  
 chief clerk on the requisition of any creditor or the insolvent (*s*).  
 The meetings subsequent to that held under s. 53, Act of 1890,  
 are summoned by sending notice in the form 82, Appendix, *post*,  
 with variations as circumstances may require, of the time and  
 place thereof to each creditor at the address given in the proof,  
 and if he has not proved at the address given in the debtor's  
 schedule or at such other address as may be known to the person  
 summoning the meeting, and when no special time is pre-  
 scribed, the notice must be sent off not less than three days before  
 the day appointed for the meeting (*t*). Unless the Court other-  
 wise orders, the proceedings and resolutions are valid at such  
 meeting, notwithstanding some creditors have not received the  
 notice sent to them (*u*).

General  
meetings other  
than those under  
s. 53, Act of 1890.

Summoning of  
such by trustee.

Time for  
summoning.

Costs of credi-  
tors' meeting.

Notice of  
meeting.

Time of service.  
Notice.

Non-reception of  
notice.  
Proof of notice.

(*m*) S. 67, Act of 1890.

(*n*) *Ibid* (10); r. 260; s. 34 (2), Act of 1897. The assignee must call such meeting when requested by one-fourth in value of the creditors who have proved. S. 67 (10), Act of 1890.

(*o*) S. 34 (1), Act of 1897.

(*p*) R. 260.

(*q*) S. 34, *ante*.

(*r*) S. 34, *ante*—(compare *Bankruptcy Act* 1890, s. 18), r. 265. The rule excepts the trustee or assignee from costs.

(*s*) S. 31 (2), Act of 1897.

(*t*) R. 261.

(*u*) R. 263.

**CHAP. V.** The meeting must be presided over by the chief clerk or by such chairman as the meeting may elect (*vide* s. 67, Act of 1890, r. 262).

Chairman of such meeting.

**Adjournment.** The meeting may be adjourned from time to time as the creditors, by an ordinary resolution may direct (*v*), to the original place of meeting or otherwise (*w*). The chairman may adjourn the meeting from time to time and from place to place with the consent of the meeting (*x*). By r. 268 directions of creditors at a meeting are given unless the acts and rules otherwise require, by an ordinary resolution, and the trustee must send to the chief clerk a copy certified by him of every resolution of meeting of creditors except the meeting held under s. 53, Act of 1890. The chairman of every meeting must cause minutes of the proceedings at the meeting to be drawn up and fairly entered in a book kept for that purpose, and the minutes must be signed by him or the chairman of the next meeting (*y*).

Mode of giving directions by creditors at meeting.

Minutes.

**Quorum.** In calculating a quorum of creditors present at a meeting those persons only who are entitled to vote at same are reckoned (*z*), and a meeting of creditors is not competent to act for any purpose except the election of a chairman, the proving of debts, and the adjournment of the meeting, unless there are present or represented thereat at least three, or all the creditors if their number does not exceed three (*a*). If within half-an-hour from the time appointed for the meeting other than the general meeting under s. 53, Act of 1890, a quorum of creditors is not present or represented, the meeting is adjourned to the same day in the following week at the same time and place, or to such other day as the chairman may appoint, not being less than seven or more than twenty-one days (*b*).

If no quorum present.

Adjournment of meeting if no quorum.

Under the rules of 1890, it was held that when at a general meeting for the election of a trustee only two creditors were represented, and one of the proofs on objection was rejected for informality and the other was admitted, there was no quorum, and the meeting closed (*c*), and that a trustee could not be elected (*d*).

(*v*) R. 286.  
(*w*) R. 287.  
(*x*) R. 278.  
(*y*) R. 282.  
(*z*) R. 280.

(*a*) R. 279.  
(*b*) R. 281.  
(*c*) *In re Thwaite*, 17 A.L.T., 150.  
(*d*) *Re Sowerby*, 1 A.L.R., 141; *In re Thwaite*, ante.

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The creditors assembled at the meeting held under s. 53, Act of 1890, may by resolution appoint some fit person or persons, not exceeding two, whether creditors or not, to fill the office of trustee of the property of the insolvent (*e*) at such remuneration (if any) as the creditors may from time to time determine, or they may resolve to leave his appointment to the committee of inspection (*f*). This provision does not apply to an estate sequestrated after a trustee has been appointed under Part IX., Act of 1890, as such trustee is appointed by the order or order nisi of sequestration instead of an assignee (*g*). The person appointed to fill the office of trustee of the joint estate must be the trustee of the separate estates (*h*). As to the power of the creditors in fixing the remuneration of the trustee and its apportionment where joint and separate estates are being administered ; *vide* p. 63, *ante*.

Powers of creditors in general meeting.

Appointment of trustees.

Remuneration of trustee and apportionment.

They may by resolution appoint some other fit persons, not exceeding five in number and whether creditors or not, to form a committee of inspection for the purpose of superintending the administration by the trustee of the insolvent's property (*i*). Each set of separate creditors may appoint its own committee of inspection, but if any set of separate creditors do not appoint a separate committee the committee (if any) appointed by the joint creditors is deemed to have been appointed also by such separate creditors (*k*). They may also by resolution fix the quorum required to be present at meetings of the committee (*l*).

Appointment of committee of inspection.

They may in general meeting elect persons to act as trustees in succession in the event of one or more of the persons first-named declining to accept the office of trustee (*m*), or failing to give security, or not being approved by the Court (*n*).

Trustees in succession.

They may by resolution give directions as to the manner in which the property is to be administered by the trustee, and it is the duty of the trustee to conform to such directions, unless the Court for some just cause otherwise orders (*o*). The directions of

Directions as to trustees.

(*e*) S. 53, Act of 1890 ; s. 18, Act of 1897.

(*f*) S. 53, *ante* ; s. 20, Act of 1897.

(*g*) S. 60, Act of 1890.

(*h*) R. 289.

(*i*) S. 53 (3), Act of 1890 ; s. 64, Act of 1897.

(*k*) R. 289.

(*l*) S. 64, Act of 1890.

(*m*) S. 64, Act of 1890.

(*n*) S. 28, Act of 1897.

(*o*) S. 53 (4), Act of 1890 ; s. 69, *Ibid*.

**CHAP. V.** the creditors at a general meeting override those of the committee of inspection (*p*), and where there are two trustees elected the creditors may declare that any act required or authorised to be done by the trustee is to be done by one or both of such persons (*q*).

Grant of tools of trade, furniture, and wearing apparel to insolvent.

They may by resolution direct that the whole or such part as they may think fit of the tools of trade, furniture and wearing apparel of the insolvent, his wife, and children be granted to him (*r*).

Power of creditors to select a bank for estates.

They may direct the assignee or trustee by ordinary resolution to keep an account in the name of the estate in such bank named in the resolution, and may authorise the assignee or trustee to pay into such bank to the credit of such account, all moneys received by him in such estate, and out of such account to pay by cheque all payments to be made by him on account of such estate, and any interest receivable in respect of the said bank account is part of the assets of the estate (*s*). Until such resolution is passed the assignee or trustee must comply with s. 54, Act of 1897.

Directions to trustee as to summoning meetings.

The creditors may also direct the trustee by resolution to summon meetings at such times as they may direct (*t*).

Proxies and voting.

Votes may be given either personally or by proxy (*u*).

General proxy.

A creditor may give a general proxy to his manager or clerk or any other person in his regular employment, and in such case the instrument of proxy must state the relation in which the person to act thereunder stands to the creditor (*v*).

Minors.

A person who is a minor cannot be appointed a general or special proxy (*w*).

Proxy not to vote in certain cases.

Voting is restricted by s. 124, Act of 1897, which provides that no person acting under proxy can vote in favour of any resolution which would directly or indirectly place himself, his wife, his employer, his partner, agent, clerk or servant in a position to receive any remuneration out of the estate of the insolvent other-

(*p*) S. 69, *ante*.

(*q*) S. 64, Act of 1890.

(*r*) S. 70, Act of 1890.

(*s*) S. 53 (1), Act of 1897—compare s. 89, Act of 1890 ; r. 376.

(*t*) S. 34 (1), Act of 1897.

(*u*) Ss. 21, 67, Act of 1890 ; r. 274.

(*v*) R. 275.

(*w*) R. 253.

wise than as a creditor rateably with the other creditors of the insolvent. *Vide* also rule 283, which contains a proviso to the effect that where any person holds special proxies to vote for the appointment of himself as trustee, he may use the proxies and vote accordingly. CHAP. V.

The vote of the trustee or of his partner, clerk, barrister and solicitor or barrister and solicitor's clerk, either as a creditor, or as a proxy for a creditor, cannot be reckoned in the majority required for passing any resolution affecting the remuneration, conduct or removal of the trustee (*x*). The authority to vote is deemed duly signed if signed with the name or style of the firm by any partner thereof (*y*). It is obligatory that the instrument of proxy should be in the prescribed form, and every insertion therein must be in the handwriting of the person giving the proxy or his barrister and solicitor or clerk, or of any manager or clerk or other person in his regular employment, or of any commissioner of the Supreme Court for taking affidavits, or of any commissioner for taking declarations and affidavits, and in case any such insertion is in the handwriting of any person other than the person giving the proxy the instrument must set forth the name and description of the person in whose handwriting such insertion has been made, and the name and description of his employer, if any (*z*). Unless such provisions are complied with, the instrument of proxy is invalid (*a*).

Limitation of voting power as to remuneration.

The instrument of proxy.

Requirements of same.

The prescribed form of a proxy provides for a witness. The person appointed to act as proxy cannot himself be the attesting witness to the instrument of proxy (*b*).

Witness to proxy.

In case of dispute as to compliance with the provisions cited of s. 123, Act of 1897, it is enacted by such section that the burden of proof is upon the person claiming to use the instrument of proxy. Rule 251 provides that a proxy given by a creditor shall be deemed to be sufficiently executed if it is signed by any person in the employ of the creditor having a general authority to sign for such creditor, or by the authorised agent of such creditor if resident abroad, but such authority must be in writing.

Burden of proof in case of dispute.

Signature to proxy.

(*z*) S. 26, Act of 1897—compare *Bankruptcy Act* 1883, s. 88.

(*y*) S. 22, Act of 1890.

(*c*) S. 123 Act of 1897.

(*a*) *Ibid.*

(*b*) *Re Parrott, ex parte Cullen*, (1891) 2 Q.B., 151.

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Filling in when  
creditor blind  
or incapable of  
writing.

The proxy of a creditor blind or incapable of writing may be accepted if such creditor has attached his signature or mark thereto in the presence of a witness, who must add to his signature his description and residence (c). All insertions in the proxy must be in the handwriting of the witness, and such witness must certify at the foot of the proxy that all such insertions have been made by him at the request of the creditor and in his presence before he attached his signature or mark (d).

Deposit of proxy  
with assignee.

A proxy cannot be used unless it is deposited with the assignee or trustee as the case may be not later than four o'clock on the day before the meeting, or adjourned meeting, at which it is used (e).

Form of proxy.

The form of a general proxy is No. 78, Appendix, *post*, and that of a special proxy, form 79, *post*.

Filing.

As soon as the proxy has been used it must be filed with the proceedings in the matter (f).

Proxies at  
meetings under  
s. 37 (ix.), Act  
of 1890.

It was doubted (g) if proxies could be used at a meeting under s. 37 (9), Act of 1890. If they could be and it was necessary to decide how a majority stood, evidence of the proxies, to make votes given under them count, would be required on an application to sequester for non-compliance with the resolution dealt with by the sub-section.

Voting by  
authorised  
agent.

The duly authorised agent of a creditor can prove and vote (h). and he can do so on his sworn statement that he is the duly authorised agent without producing the document giving him the necessary authority, and if the proof be that of a secured creditor he may also value the security (i).

Persons who  
may vote.

Only those persons are entitled to vote as creditors who have at or previously to the meeting, in the prescribed manner, proved a debt provable under the insolvency to be due to the person proving (k), and r. 269 provides that no person can vote unless his proof has been duly lodged within the time prescribed by the rules. No person can vote if notice of an application to reduce or expunge his proof has been given (l).

Proofs  
objected to.

(c) R. 252.

(d) *Ibid*.

(e) Rr. 276-253.

(f) R. 250.

(g) *In re Southey*, 5 V.L.R. (I.), 4.

(h) S. 21, Act of 1890.

(i) *In re Evans*, 6 A.L.T., 249.

(k) S. 67 (2), Act of 1890; r. 269.

(l) S. 107, Act of 1890. *Vide ante* at p. 154, note (h).



A preferential creditor may vote (*m*).

CHAP. V.

A creditor cannot vote in respect of any unliquidated or contingent debt or any debt the value of which is unascertained (*n*). Preferential creditors.  
As to contingent claims.

A secured creditor for the purposes of voting is deemed to be a creditor only in respect of the balance (if any) due to him after deducting the value of his security (*o*), and previously to voting he must state, unless he surrenders his security, in his proof the particulars of his security, the date where it was given, and the value at which he assesses it (*p*). If he votes in respect of his whole debt he is deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value his security has arisen from inadvertence (*p*). A secured creditor who states in his proof that his security is worthless does not omit to value his security within the meaning of this rule, and where the creditor deliberately omits to value his security in his proof in consequence of erroneous information that his security is worthless he does not omit to value such security by "inadvertence" (*r*). The omission to value does not invalidate the vote (*s*). A secured creditor means any creditor holding any mortgage, charge, or lien on the insolvent estate or any part thereof as security for a debt due to him (*t*). Voting by secured creditors.

A creditor cannot vote in respect to any debt on or secured by a current bill of exchange or promissory note held by him, unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the debtor and against whom an order for sequestration has not been made and whose affairs are not being liquidated by arrangement and who has not made a statutory composition with his creditors as a security in his hands, and to estimate the value thereof, and for the purposes of voting, though not for the purpose of dividend, to deduct it from his proof (*u*). Voting by creditor on current bill or note.

As to production of security or bill for voting, *vide* r. 226.

Production of security or bill for voting.

(*m*) *Vide In re Trump*, 6 A.L.T., 2.  
(*n*) S. 67 (3), Act of 1890; s. 120, Act of 1897—compare *Bankruptcy Act* 1883, sch. 1 (9); and *vide Ex parte Jackson*, 27 L.T., 697.

(*o*) S. 67 (4), Act of 1890; r. 270.

(*p*) R. 270.

(*r*) *In re and ex parte Piers*, (1898) 1 Q.B., 627; 5 Manson, 97. For an instance where a secured creditor was allowed to withdraw or amend his

proof put in from inadvertence, *vide Re King, ex parte Mesham*, 2 Morrell, 119.

(*s*) *Ex parte Ashworth, re Hoare*, L.R., 18 Eq. 705.

(*t*) S. 67 (5), Act of 1890; *vide* "Proofs of Debt," Division 3 of this Chapter, *post*, where the subject of secured creditor is dealt with.

(*u*) S. 121, Act of 1897—compare *Bankruptcy Act* 1883, sch. 2 (11); r. 271.

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Voting by  
partners or  
administrators.

In reckoning the number of votes at any meeting of creditors, the partners of any firm and any persons in whom the joint administration of any estate is vested are entitled to one vote only, and are considered as one person (*v*).

Voting by  
partnership  
creditor against  
insolvent  
partner of firm.

If an order of sequestration is made against one partner of a firm any creditor to whom that partner is indebted jointly with the other partners of the firm, or any of them, may prove his debt for the purpose of voting at any meeting of creditors and vote thereat (*w*). It would seem that separate creditors under a joint adjudication cannot vote in the election of a trustee (*x*), though both estates are vested in the same trustee (*y*). The person appointed trustee of the joint estate becomes *ipso facto* trustee of the separate estates, but the separate creditors can appoint a distinct committee of inspection (*b*).

As to separate  
creditors in a  
joint  
adjudication.

Powers of  
chairman as to  
voting.

The chairman of a meeting of creditors has power to admit or reject a proof for the purpose of voting subject to appeal to the Court (*c*). If he is doubtful whether a proof should be admitted or rejected, he must mark the proof as objected to, and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained (*d*).

What creditors  
entitled to vote  
in number and  
in value.

When the votes of creditors are to be counted in number, no creditor whose debt is below £25 sterling is reckoned in number, but the debt due to such creditor is computed in value, and in all cases in which any deduction is directed by the Acts to be made from the amount of the debt of any creditor the vote of such creditor is still counted in value to the extent of the balance remaining after such deduction, and such creditor is also reckoned in number provided such balance amounts to £25 and upwards (*e*). This provision does not apply to the necessary majority required by s. 131, Act of 1890, to enable the insolvent to apply to the Court for a release, as the former only relates to votes for or against resolutions at meetings of creditors, and it would be incorrect to make the written consent required by s. 131 to mean the same as vote, and to interpret the meaning of s. 131, which

(*r*) S. 23, Act of 1890.

(*w*) R. 272.

(*x*) *Vid Ex parte Parr, re Leigh*, 1 Rose, 76; *Ex parte Hamer, in re Hayman*, 1 Rose, 321.

(*y*) *In re Curtain and Healy*, 5 V.L.R.

(I.), 109; r. 289.

(*b*) R. 289.

(*c*) R. 273.

(*d*) *Ibid*.

(*e*) S. 26, Act of 1890—compare 28 Vict., No. 273, s. 130.

has no reference to meeting or voting, by the provisions of s. 26 (f). CHAP. V.

Meaning of  
resolution.

A resolution of creditors unless otherwise provided means an ordinary resolution (g).

A majority in value carries an ordinary resolution (h), and a majority in number and three-fourths in value a special resolution (i). Ordinary and  
special  
resolutions.

An extraordinary resolution in liquidation by arrangement is one agreed to by a majority in number and value of the creditors of the debtor appearing on the statement (k), and an extraordinary resolution in composition with creditors is one that requires to be passed by three-fourths in number and value of the creditors of the debtor on the statement assembled or represented at the meeting, and confirmed by a majority in number and value of the creditors represented at the subsequent meeting (l). Extraordinary  
resolution in  
liquidation by  
arrangement.  
Extraordinary  
resolution in  
composition.

## 2. THE ASSIGNEE.

Assignees are appointed by the Governor-in-Council as may be from time to time required. The official assignees at the original passing of the Act were the first assignees under it, and any of such persons or assignees the Governor-in-Council may remove (m). They must give such security as the same authority may from time to time direct (n). The assignee is an officer of the Court, and subject to its orders, and the Court may at all times summon and examine him on oath and require him to answer any enquiry made of him, and to produce all books, papers, deeds and documents relating to insolvent estates in his possession (o), and the Court may also direct an investigation to be made of his books, accounts and vouchers by the official accountant (p). The Court also may upon the application of any person interested, or without any application, order the assignee to lodge in Court any books, accounts, documents or vouchers in his possession or under his control in relation to or in connection with any estate of which Appointment  
and removal by  
Governor-in-  
Council.  
  
Officers of Court.  
  
Control by  
Court.

(f) *In re Keogh*, 7 A.L.T., 79.

(g) S. 67 (8), Act of 1890.

(h) S. 67 (7), *ibid.*

(i) *Ibid.* (9).

(k) S. 153, Act of 1890.

(l) S. 154, *ibid.* *Vide* Chapter 9, *post.*

(m) S. 52, Act of 1890. *Vide* also

removal and resignation of assignee and trustee, p. 172, *et seq.*, *post.*

(n) The practice has been to fix the amount at the appointment.

(o) S. 52, *ante*; s. 32 (2), Act of 1897.

(p) S. 32 (2), *ante.*

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he is the assignee, and such books, documents and vouchers may be retained or dealt with as the Court may think fit (*q*); and the Court has by s. 32, Act of 1897, control over assignees in the same manner as it has over trustees. As to the remuneration of assignees, *vide* Chapter II., at page 62.

Preservation and  
realisation, &c.,  
of estate by  
assignee.

The assignee, until the confirmation of a trustee, must as nearly as may be preserve the estate in the same condition as it is at the date of the order or order *nisi* for sequestration (*r*). With the sanction of a judge or the creditors at a meeting the assignee may realise or take proceedings to recover any portion of the insolvent estate (*s*). In the event of the assignee suing it has been held that there is no necessity to prove that a trustee has not been appointed or that he has obtained the sanction referred to (*t*). As to the payments in and out of bank and retention of money by assignee, *vide* Division 4 of this Chapter, *post*.

Payments in and  
out of bank and  
retention of  
money.

As to proofs of  
debt.

The assignee's power as to proofs of debt until it is ascertained that he will not be superseded by a trustee is limited to the investigation of the proofs sent in to him to discover if they comply with the provisions of s. 106, Act of 1890, or not, and he cannot at such time legally admit or reject a proof (*u*). As to the assignee's duties as to same where no trustee is confirmed, see Duties of Trustee, *post*.

Attachment of  
estate.

The assignee or trustee is empowered to authorise his messenger by warrant, under his hand, to seize and lay an attachment on the insolvent estate, and make an inventory thereof. The messenger making such attachment must leave, with the person in whose possession any such property is attached, a copy of the warrant under the seal of the Court together with a copy of the inventory, having subjoined thereto a notice that the property of the insolvent has been attached by the messenger, and that any person who, knowing the same to have been so attached, shall dispose of, remove, retain, embezzle, conceal or receive the same, or any part thereof, with intent to defeat the attachment is liable, on conviction of such offence, to be imprisoned, with or without hard labour, for any period not exceeding three years (*v*). The mes-

Duty of  
messenger.

(*q*) S. 33, Act of 1897.

(*r*) S. 68, Act of 1890.

(*s*) *Ibid.*

(*t*) *Simson v. Guthrie*, 4 A.J.R., 123.

(*u*) *In re Blight*, 15 V.L.R., 175.

(*v*) S. 65 Act of 1890. By s. 156, sub-s. 3 (*vide* Chapter XI., *post*), the punishment of any person other than

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senger may secure on the premises by sealing up any repository room or closet any articles which in the discharge of his duty it shall seem to him expedient so to secure, or may leave some person on the premises in custody thereof (*w*). The assignee, however, has no right to go to a third person's house and there take property of the insolvent and close up the house against the owner (*x*). His duty is to obtain a warrant of the Court to seize property divisible among the creditors in the insolvent's custody or possession or in that of any other person (*y*), as any person acting under warrant of the Court may seize any property of the insolvent, divisible amongst his creditors under the Acts, in the insolvent's custody or possession or in that of any other person and with a view to such seizure may break open any house, building or room of the insolvent where the insolvent is supposed to be, or any building or receptacle of the insolvent where any of his property is supposed to be (*z*). If the Court or judge is satisfied that there is reason to believe that property of the insolvent is concealed in a house or place not belonging to him a search warrant may be granted either to any constable or prescribed officer of the Court, or to such other person as the Court may think fit to name, who may execute the same according to the tenor thereof (*a*). As to the form of warrants, *vide* forms 135-137-138, Appendix, *post*.

Seizure of property in possession of third person.

Search warrant for concealed property.

Form of warrants.

As to the attachment of crops, the assignee must take use or dispose of hay, straw, grass or grasses, turnips or other roots, or any other produce of the insolvent's land, or any manure, compost, ashes, seaweed or other dressings intended for such land and being thereon in the same manner and purpose as the insolvent ought to have taken, used or disposed of the same if no order for sequestration had been made (*b*). The assignee or trustee is not liable for the wrongful acts of his messenger or bailiff not author-

Attachment of crops, &c.

Liability of assignee for acts of bailiff.

the insolvent for disposing of, receiving, removing, retaining, concealing or embezzling any properties, moneys, or securities for money belonging to any insolvent estate which have been attached, &c., cannot exceed six months. The punishment under 5 Vict. No. 17, s. 75, and 28 Vict. No. 273, s. 112, was three years.

(*w*) S. 65, *ante*—compare 5 Vict. No. 17, ss. 21, 22 and 75; 28 Vict. No. 273, ss. 59 and 60; and 32 and 33 Vict. c. 71, s. 20, under the Acts prior to that of 1871

the chief commissioner made the attachment by his messenger. As to interference with attached property being a contempt, *vide In re Bateman*, 2 V.L.R., 203.

(*x*) *Chapman v. Carolin*, 20 V.L.R., 71.

(*y*) *Ibid.*, and s. 66, Act of 1890.

(*z*) S. 66, *ante*.

(*a*) *Ibid.*; r. 97.

(*b*) *Landlord and Tenant Act* 1890, s. 44.

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Liability as to  
issue of warrant.

Liability of  
assignee when  
order *nisi*  
discharged.

Estate to be  
handed by  
assignee to  
trustee.

Duty to impart  
information to  
trustee.

Receipt for  
books to  
insolvent.

Accounting to  
trustee and to  
insolvent.

Duties where  
no trustee  
confirmed.

ised by the warrant issued by him and not afterwards ratified by him, and his position therefore is not analogous to that of the sheriff. The latter receives a writ which he is bound to execute in person, and if he delegates his duty he takes the risk, the assignee on the contrary issues his writ to other people to have executed (c). The assignee or trustee, however, is liable for the improper issue of his warrant or for anything done under a warrant improperly issued (d). The assignee is not personally responsible or liable for any act *bond fide* done by him or by his order or authority in the execution of his duty as such assignee by reason of the order *nisi* being discharged (e).

The assignee, upon the appointment of a trustee, must forthwith put the trustee into possession of all property of the insolvent of which he may be possessed (f), and it is his duty if so requested by the trustee to communicate to him all such information respecting the insolvent and his estate and affairs as may be necessary or conducive to the due discharge of the duties of the trustee (g).

The assignee must give a receipt for all books lodged with him by the insolvent specifying the same and such receipt must be in duplicate and such duplicate must be signed by the insolvent as correct and then retained by the assignee (h).

When a trustee is appointed the assignee must account to him, and when the estate is ordered to be released from sequestration the assignee or trustee as the case may be must account to the insolvent (i).

If no trustee be confirmed the duties, powers, rights and liabilities of the assignee are the same (except as by the Acts otherwise expressly provided), as those of a trustee confirmed by the Court, and whenever in the Acts any powers, rights, duties or liabilities are conferred or imposed upon a trustee such powers, rights, duties and liabilities are deemed to be conferred and imposed upon an assignee if no trustee be confirmed (k).

(c) *Willett v. Turner*, 1 V.L.R. (L.),  
294.

(d) *Ibid.*

(e) S. 91, Act of 1890.

(f) R. 366.

(g) R. 367.

(h) *Ibid.*

(i) Rr. 368, 369.

(k) S. 68, Act of 1890; s. 1, Act of  
1897.

It has been judicially observed (*l*), that the Act is apparently defective in failing to show definitely the point of time at which it is ascertained that the contingency has happened described in the words, "if no trustee be confirmed," but that practically it is reached at the first meeting of creditors though there is nothing in the Act that requires that the trustee should be elected then or never (*m*). The difficulty of determining when this stage is reached does not, however, warrant a construction authorising him to act as trustee before it is reached (*n*).

### 3. THE TRUSTEE.

The Court may if it think fit on the application of any person order that such person be registered as qualified to be appointed to the office of trustee under the Acts, and he is thereupon registered accordingly by the chief clerk in a book to be kept for the purpose, and the Court may at any time if it think fit order such registration to be cancelled, and no person except an assignee (except as provided by s. 18, Act of 1897), who is not so registered is capable of being appointed or, unless appointed to such estate before the commencement of the Act of 1897, of acting as trustee of any estate in insolvency (*o*). Every person appointed to fill the office of trustee must give security to the satisfaction of the Court (*p*). Such security must be given to such officers or persons and in such manner as the Court may from time to time direct, and may be given either specially in a particular matter or generally be available for any matter in which a person giving security may be appointed as trustee (*q*). The Court must fix the amount and nature of such security, and may from time to time as it may think fit either increase or diminish the amount of special or general security which any person is to give (*r*).

Registration of persons capable of being trustees.

Security.

The rules as to the registration of persons as trustees and those relating to the security to be given are those numbered 332 to 350 in the Appendix, *post*.

Rules as to registration of such persons and security.

(*l*) *Vide In re Blight*, 15 V.L.R., at p. 182.

(*m*) *Ibid*.

(*n*) *Ibid*.

(*o*) S. 17 (1), Act of 1897

(*p*) *Ibid* (2)—compare *Bankruptcy Act* 1883, s. 21 (2). By s. 53 (2), Act of

1890, the creditors could by resolution declare what security should be given and to whom by the person appointed before he entered on the office.

(*q*) S. 17 (5), Act of 1897.

(*r*) *Ibid* (5).

## CHAP. V.

Chief clerk to keep register book of registered trustees and cancellation.

Chief clerk to transmit copy order of registration or cancellation to every other chief clerk and to official accountant.  
Inspection of register.

Enforcement of security and assignment of bond.

Opposition to registration.  
Grounds for refusal.

Application to cancel registration.

Powers to creditors to specially appoint any person as trustee.

Security.

The chief clerk of the Court of each district must enter in the register book kept by him particulars as to the persons ordered to be registered as qualified to be appointed as trustees (*s*), and on any order being made for the cancellation of any person's registration he must strike that person's name out and make the entries required by rules 128 and 130, and he must also transmit by post to the chief clerk of every other district and to the official accountant an office copy of every order of registration or cancellation made under s. 17, Act of 1897 (*t*). Any person is entitled at all reasonable times to search the register books on payment of the prescribed fee (*u*).

The Court may on the application by motion in a summary way made by any person interested, on being satisfied that the condition of any bond of security has been broken, order the official accountant to assign such bond in the manner prescribed by r. 347, Appendix, *post*, and the amount may be recovered in the manner therein prescribed (*v*).

The official accountant or any person may without notice to the applicant oppose the application for registration (*w*). As to grounds for refusal of registration, *vide* refusal of confirmation of trustee, p. 171, *post*.

Application to cancel the registration of a trustee may be made to the Court at any time by the official accountant or any creditor or person (*x*); and if a person ordered to be registered under s. 17, Act of 1897, do not give the prescribed security within twenty-one days after the date of the order for his registration the Court may if it think fit order such registration to be cancelled (*y*), and likewise in the case of a person ordered to be registered under s. 18 of the said Act who has failed to give the prescribed security within seven days (*z*).

The creditors of any insolvent can appoint any person whether a creditor or not of such insolvent to be the trustee of the estate of such insolvent, and if the person so appointed within seven days after such appointment informs the Court in writing that

(*s*) *Vide* rr. 126, 127 and 129.

(*t*) *Vide* rr. 127, 128.

(*u*) R. 132.

(*v*) *Vide* s. 17 (5), Act of 1897, and r. 347.

(*w*) R. 336.

(*x*) R. 337.

(*y*) R. 350 (2).

(*z*) *Ibid* (3).



he has been so appointed, then the Court may order that such person on giving such security as the Court may fix be registered as qualified to be appointed to the office of trustee under the Acts in respect only of such estate, and he is thereupon registered accordingly by the Chief Clerk in a book to be kept for the purpose, and on such registration and until the cancellation of such registration he is capable of acting as trustee under the Acts for such estate (a). The Court may at any time if it think fit, order that such registration be cancelled (b).

CHAP. V.

Registration of such person.

Cancellation.

Trustees not exceeding two are elected by the creditors in the general meeting, or their appointment may be left by the creditors to the committee of inspection (c). When two trustees are appointed, the creditors may declare whether any act required or authorised to be done by the trustee is to be done by both, but both are included under the term "trustee," and are joint tenants of the insolvent estate (d), and they cannot delegate their authority (e). Trustees may also be elected by the creditors in succession in the event of one or more of the persons first named declining to accept the office (f), or failing to give security, or not being approved of by the Court (g). It was held under the Act and Rules of 1890, that a trustee cannot be elected if a quorum of creditors is not present or represented at the meeting, and therefore where only one creditor is present the estate remains with the assignee (h).

Election of trustee.

Declaration by creditors.

Trustees are joint tenants.

Election of trustees in succession.

If a vacancy occurs in the office of a trustee, the creditors in general meeting may appoint a person to fill the vacancy, and thereupon the same proceedings are taken as in the case of a first appointment (i). The chief clerk must on the requisition of any creditor or the insolvent summon a meeting for the purpose of filling such vacancy (k). If the creditors do not within three week's after the occurrence of a vacancy appoint a person to fill the same, the chief clerk must report the matter to the Court, and the Court may appoint a trustee, but in such case the creditors

Proceedings in case of vacancy in office of trustee.

(a) S. 18 Act of 1897.

(b) *Ibid*, vide note (z), ante.

(c) S. 53, Act of 1890. No defect or irregularity in the election of a trustee vitiates any act *bond fide* done by him : (a. 64 [xi.]) Act of 1890.

(d) S. 64 (1), Act of 1890.

(e) *Douglas v. Browne*, Mont. 93.

(f) S. 64 (1), ante.

(g) S. 28, Act of 1897.

(h) *Re Sowerby*, 1 A.L.R., 141 ; vide also *In re Thwaites*, 17 A.L.T., 150 ; vide meetings of creditors, p. 156, ante.

(i) S. 31, Act of 1897—compare *Bankruptcy Act* 1883, s. 87—see also and compare Act of 1890, ss. 58, 64 (2) (3) (4).

(k) *Ibid* (2).

CHAP. V. or the committee of inspection have the same power of appointing a trustee as in the case of a first appointment (*l*). During any vacancy in the office of assignee or trustee the Court may appoint any assignee to act as assignee or trustee as the case may be (*m*).

Where the assignee is dead.

Notice to creditors of application.

Application by insolvent.

Disclosure of motive.

Under the Act of 1871 where the assignee was dead it was decided, when the Court was asked to appoint a new assignee, that proof should be submitted of what creditors there were, if any, and of service of the notice of application on them (*n*), and an affidavit was required by the applicants' solicitor and not his managing clerk (*o*). Under the Act 7 Vict. No. 19, s. 12, where the assignee had resigned and the insolvent moved for the appointment of a new assignee, the Court required that the insolvent's motive for so applying should be stated and whether there were or were not creditors. Service of notice of the application on the creditors was necessary and also upon the assignee said to have resigned, and the person proposed to be appointed (*p*). Where the motive or object of the insolvent in applying for the appointment of a new assignee was contrary to the policy of the Act, as to get a title to land which he had trafficked in and disposed of after sequestration, the Court refused the application (*q*). On the other hand, if a creditor made such an application, or if the insolvent had merely wanted to get his certificate, the application would be granted (*r*).

*Bond fide* acts of trustee protected.

No defect or irregularity in the election of a trustee vitiates any act *bond fide* done by him (*s*), neither does the death, resignation, or removal of any assignee or trustee affect the validity of any lawful act done by him as assignee or trustee prior to his death, resignation or removal (*t*).

Confirmation of appointment.

The Court may, upon the acceptance in writing of office by the trustee and on being satisfied that he is duly registered as required by the Act and that the requisite security has been given, make an order confirming his appointment (*u*). Where an order is so made the person appointed must cause notice of such confirmation to be forthwith advertised in the *Government Gazette* and a

(*l*) *Ibid* (3).

(*m*) *Ibid* (4).

(*n*) *In re Wright*, 11 V.L.R., 111.

(*o*) *Ibid*.

(*p*) *In re Snowball*, 11 V.L.R., 112.

(*q*) *In re Tregaskis*, 11 V.L.R., at p.

115.

(*r*) *Ibid*.

(*s*) S. 64 (11), Act of 1890.

(*t*) S. 63, *ibid*—compare 5 Vict. No.

17, s. 58.

(*u*) S. 17 (2), Act of 1897.

local paper, in the form No. 36, Appendix, *post*. The expense of such gazetting and notice may be charged to the estate (*v*). If the Court be satisfied upon objection made by the insolvent or any creditor that the appointment has not been made in good faith by a majority of the creditors voting, or that the connection of the person elected with, or his relation to the insolvent or his estate, or any particular creditor makes it difficult for him to act with impartiality in the interests of the creditors generally, or for any other reasonable cause the Court may refuse to confirm the appointment (*w*).

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Advertisement  
of order.Refusal of  
confirmation.

As to a person's relation to the estate making it difficult for him to act with impartiality in the interests of the creditors generally, it was formerly held that the office of solicitor to the commission or his partner was inconsistent with the office of trustee (*x*), it being considered part of the trustee's duty to direct and control the solicitor, and that the same person should not be permitted to fill two offices, one of which it was said is in its nature responsible to the other (*y*). A person having adverse or conflicting interests to the creditors is not a proper person to act (*z*), and confirmation will be refused if the election has been secured by a stratagem as by invalid objections to proofs (*a*), or if the person appointed has put himself into a position in which he would have to decide between his own interest and that of the creditors, on the ground that in such cases it would be difficult for him to act impartially in the interests of the creditors generally; for instance, a trustee under a deed of assignment executed prior to sequestration, as in that capacity he would have to account to himself as trustee in the bankruptcy, or an accountant who takes possession of the debtor's estate, shortly before the adjudication for the purpose of controlling his receipts and expenditure (*b*). On the same ground sanction

(*v*) *Ibid* (3); r. 348.

(*w*) See 17 (4), Act of 1890—compare s. 21 (2), *Bankruptcy Act* 1883.

(*x*) *Ex parte Rice*, re *Oldfield*, Mont. 259.

(*y*) *Vide Ex parte Badcock*, in re *Grundy*, M. & McA., at p. 243.

(*z*) *Vide Ex parte De Tasted*, in re *Latham*, 1 Rose, 324; vide also *In re Lamb*, *ex parte the Board of Trade*, (1894) 2 Q.B., 805; and *In re Mardon*, *ex parte the Board of Trade*, (1896) 1 Q.B., 140; 2 Manson, 511, where the

person seeking appointment would have to investigate his own account.

(*a*) *Vide Ex parte Spiller*, in re *Waters*, 2 M.D. & D., 43.

(*b*) *In re Mardon*, ante; *Re Martin*, *ex parte the Board of Trade*, 5 Morrell, 129; 21 Q.B.D., 29; *Re Stovold*, *ex parte the Board of Trade*, 6 Morrell, 7. As by s. 83, Act of 1897, a trustee under a deed of arrangement is deemed to be an officer of the Court, and the Court has the same power over him as a trustee in insolvency, and as he is under

**CHAP. V.** was refused to the same person being trustee of two estates, he being pecuniarily interested in the success of a claim which one estate had against the other (c). It is a sufficient reason for refusing confirmation or registration of a person as trustee, that the applicant has not complied with the requirements of s. 127, Act of 1890, or ss. 60 or 85, of the Act of 1897, or, that in any other proceeding under the Acts such person has been removed under s. 57, Act of 1890, or s. 30 (2), Act of 1897, from the office of trustee, or has failed or neglected without good cause shown by him to render his accounts for audit for one month after the date by which the same should have been rendered (d).

Order confirming appointment.  
Effect of order on vesting of estate.

The order confirming the election or appointment of a trustee must be drawn up as and is an order of the Court (e). The order may be appealed from (f). The order divests the assignee and vests the estate in the trustee (g), and upon the latter's death, resignation or removal the order confirming the election of the new trustee vests in him the whole of the insolvent estate and all the powers, rights, titles, privileges and remedies vested in or competent to the former trustee (h).

If no trustee confirmed assignee to be deemed to be trustee.

If no trustee be confirmed the assignee for the time being is deemed to be the trustee, and wherever in the Acts the word "trustee" is used the same applies to an assignee if no trustee be confirmed (i).

Removal of assignee and trustee by the Court.

The Court may remove any assignee or trustee for misconduct or neglect or omission in the performance of his duties, or for absence from the colony, or in any case in which it is of opinion that the trustee is by reason of lunacy or continued sickness or absence incapable of performing his duties, or that his connection with or relation to the insolvent or his estate or any particular creditor might make it difficult for him to act with impartiality in the interests of the creditors generally, or where in any other matter he has been removed from office on the ground of misconduct or for any other reasonable cause (k).

the same obligations as such trustee, the applicability here of the decisions referred to may be affected.

(c) *In re Lamb, ex parte the Board of Trade*, (1894) 2 Q.B., 805; 1 *Manson*, 373.

(d) R. 349.

(e) S. 62, Act of 1890; s. 17 (2), Act of 1897.

(f) *In re Mackay*, 2 V.R. (I.), 22.

(g) S. 61, Act of 1890.

(h) S. 63, *ibid.* Vide "Vesting of Estate," Division 2, *post*.

(i) S. 56, *ibid.* S. 1, Act of 1897.

(k) S. 30 (2), Act of 1897—compare *Bankruptcy Act* 1883, s. 86 (2); *Bankruptcy Act* 1890, s. 19.

The creditors may by ordinary resolution at a meeting specially called for that purpose, of which seven days notice has been given, remove the trustee appointed by them or by the committee of inspection, and may at the same or any subsequent meeting appoint another person to fill the vacancy as provided in case of a vacancy in the office of trustee (*l*).

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Removal of trustee by creditors.

The general meeting to consider the propriety of removing a trustee where one-sixth of the creditors in number or value who have proved desire it to be summoned may be summoned by a member of the committee of inspection or by the chief clerk on the deposit of a sum which he considers sufficient to defray the expenses of summoning such meeting and such sum, if the creditors or Court so direct, must be repaid to them out of the estate (*m*). The vote of the trustee or his partner, clerk, barrister and solicitor or barrister and solicitor's clerk, either as a creditor or as a proxy, is not reckoned in the majority required to pass any resolution affecting the removal (*n*).

The creditors' meeting to consider conduct of trustee.

The Court has power under ss. 5, Act of 1890, and 5 (1), Act of 1897, to restrain the creditors from holding the meeting convened to consider the removal of the trustee until after a question as to expunging the proof of a creditor has been decided (*o*).

Power of Court to restrain creditors.

If the estate of a trustee be sequestrated or if he make a composition with his creditors or liquidate his affairs by arrangement, he thereby vacates his office as trustee (*p*).

Vacation of office by insolvency, &amp;c.

Misconduct includes the retention of moneys in his hands instead of paying the same into the bank appointed at the meeting, or failing such appointment into such bank as the rules may direct, for more than ten days, if the sum exceeds £50, unless he can prove to the Court that his reason for retaining the money was sufficient (*q*). In this instance he is also liable to pay interest on such sum exceeding £50 as he may retain in his hands, and he also loses his claim for remuneration and is liable for any expenses to which the creditors may be put by or

Misconduct.

(*l*) S. 30 (1), Act of 1897—compare *Bankruptcy Act* 1883, s. 86, and *Bankruptcy Act* 1869, s. 83 (4). As to filling vacancy, see *ante* p. 169.

(*m*) S. 37, Act of 1897; r. 361.

(*n*) S. 26, Act of 1897.

(*o*) *Vide Ex parte Sayer, in re*

*Mansel*, 19 Q.B.D., 679.

(*p*) S. 29, Act of 1897—compare *Bankruptcy Act* 1883, s. 85; and *vide* s. 64 (4), Act of 1890.

(*q*) S. 54 (6), Act of 1897; s. 89 (2), Act of 1890.

**CHAP. V.** in consequence of the dismissal (*r*). Conniving at the insertion of a fictitious debt (*s*), the purchase by the trustee of assets belonging to the estate unless a proper motive is shown (*t*), the improper resistance to wishes of the creditors (*u*), and failure to keep the books prescribed by the Acts and Rules are also included under this heading.

Difficulty in acting impartially in interest of creditors generally.

The trustee will not be permitted to act as such if the circumstances are such that they might make it difficult for him to act with impartiality in the interest of the creditors generally (*w*).

Removal for failing to keep up security.

Where he has given security in manner prescribed by the Rules, but fails to keep up such security, the Court may, if it think fit, remove him from his office (*x*).

For failure to make annual return to official accountant.

If the trustee fail to make the annual return set out in r. 354, Appendix, *post*, he may be removed from his office by the Court at the instance of any one creditor or of the official accountant (*y*).

Advertising of order of removal.

The chief clerk must cause notice of every order made for the removal of any assignee or trustee to be forthwith advertised in the *Government Gazette* (*z*).

Form of advertisement.

The form of notice or advertisement is No. 36A, Appendix, *post*.

Effect of removal on action.

In the event of the removal of an assignee or trustee no suit or action relative to the insolvent estate is thereby abated, but the Court in which the same is depending, or any judge thereof, may upon the suggestion of such removal and that a new assignee or trustee has been appointed or elected and confirmed, allow the name of the new assignee or trustee to be substituted in the place of the person removed and the suit or action then proceeds as if such new assignee or trustee had originally commenced or defended the same (*a*).

Resignation and discharge of assignee or trustee.

On the assignee or trustee desiring to resign his office he may apply to the Court for leave, and if no valid objection be stated,

(*r*) *Ibid*.

(*s*) *Ex parte Perryer*, in *re Innes*, 1 M.D. & D., 276.

(*t*) *Vide* cases on this point to footnote of report *Ex parte Alexander*, in *re Hobbs*, 2 M. & A., at p. 494.

(*u*) In *re Mackay*, 3 A.J.R., 10; *Ex parte Newitt*, *re Mansell*, 14 Q.B.D.,

177.

(*w*) *Vide* "Refusal to confirm Appointment," *ante* at p. 171.

(*x*) R. 350.

(*y*) *Vide* r. 354.

(*z*) S. 30 (3), Act of 1897.

(*a*) S. 80, Act of 1890.

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and if the Court be satisfied that he has complied with the provisions of the Acts and rules, his application may be granted, but if any objection be stated thereto the Court proceeds to determine the same, and makes such order thereon as it deems fit, and if the application for leave to resign be granted the Court may make such orders as may be necessary for the preservation and administration of the estate until a new assignee or trustee be appointed or elected and confirmed, and for the discharge and acquittance of the said assignee or trustee and for the security and payment of any unclaimed dividends to the parties entitled to the same (b). The order of the Court allowing an assignee or trustee to resign does not prevent the assignee or trustee thereafter appointed or elected and confirmed in his stead from calling upon him to account as assignee or trustee prior to his resignation (c). A trustee cannot delegate his general authority, and, therefore, where the applicant was in ill-health and desirous of proceeding to England leave to resign was granted, and the election of a new trustee ordered (d). It was shown that the applicant's co-trustee consented and that the applicant had in all things complied with the requirements of the Act and rules, and the position of the estate was generally set forth. Notice of the application had also been served by prepaid post letter on all creditors who had proved on the estate and advertised in a daily newspaper on three occasions. It is now provided by r. 356 that the trustee must give seven days' notice of his intention to apply to the Court for leave to resign to every creditor who has proved and to the official accountant. The application to the Court is made by way of motion (e). The official accountant, or any creditor who has proved his claim, may, without notice to the trustee, oppose the application for leave to resign (f).

Order for  
preservation of  
estate.

Accounting by  
trustee  
resigning.

Notice to  
creditors and  
official  
accountant.

Application by  
motion.

Opposition to  
application.

Upon a trustee resigning or being released or removed from his office he must deliver over to the official accountant or the new trustee, as the case may be, all books kept by him, and all other books, documents, papers and accounts in his possession, relating to the office of trustee (g). The release does not take

Delivery of  
books, papers,  
&c., upon  
trustee  
resigning, being  
removed or  
released.

(b) S. 58, Act of 1890.

(c) S. 58, Act of 1890—compare 28 Vict. No. 273, s. 58.

(d) *Vide Douglas v. Brown*, 1 Mont.,

93. *In re McLennan*, 2 A.L.T., 112.

(e) R. 355.

(f) R. 357.

(g) R. 325.

CHAP. V. effect unless and until he has delivered over to the chief clerk all the books, documents, papers and accounts, which by the Acts or rules or any order of Court, the trustee is required to deliver over on his release (*h*).

Discretion of trustee as to estate.

Subject to the provisions of the Acts, the trustee must use his own discretion in the management of the estate, and its distribution among the creditors (*i*), and if the insolvent or any of the creditors or any person interested is aggrieved, by any act or decision of the trustee, he may apply to the Court, and the Court may confirm or reverse or modify the act or decision complained of, and make such order in the premises as is just (*k*).

Appeal to Court against trustee.

A "person aggrieved" must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something (*l*).

Control of Court over trustees and assignees.

The Court takes cognizance of the conduct of trustees and assignees (*m*), and in the event of it having any reasonable ground for believing that any assignee or trustee is not faithfully performing his duties, and duly observing all the requirements imposed on him by any Act, rules or otherwise with respect to the performance of his duties, or is omitting to use reasonable diligence with respect to the performance of his duties, or in the event of any complaint being made to it in regard thereto by any creditor or the insolvent, or any person interested, the Court must inquire into the matter and take such action therein as may be deemed expedient (*n*). The Court may at any time require an assignee or trustee to answer an inquiry made of him in relation to any insolvency in which he is engaged, and may if it think fit examine him or any other person on oath concerning the insolvency (*o*). The Court may also direct an investigation to be made of the books, accounts and vouchers of the assignee or

Assignee or trustee to answer inquiries.

Examination on oath of assignee trustee or any other person.

(*h*) S. 59, Act of 1897.

(*i*) S. 35 Act of 1897—compare *Bankruptcy Act* 1883, s. 89 (4).

(*k*) *Ibid*, s. 36—compare *Bankruptcy Act* 1883, s. 90.

(*l*) *Ex parte and In re Sidebotham*. 14 C.D., at p. 465. For instances of persons held to be aggrieved, *vide Ex parte Walter, re Webb*, 2 Ch. D., 326; *Ex*

*parte Official Receiver, re Reid*, 19 Q.B.D., 174; *Re Batten, ex parte Milne*, 22 Q.B.D., 685; *Re Lamb, ex parte Board of Trade*, (1894) 2 Q.B., 805.

(*m*) S. 32 (1) Act of 1897—compare *Bankruptcy Act* 1883, s. 91.

(*n*) *Ibid*.

(*o*) *Ibid* (2).



trustee by the official accountant (*p*), and it may also order any assignee or trustee to lodge in Court any books, accounts, documents or vouchers in his possession, or under his control in relation to or in connection with any estate of which he is assignee or trustee, and such books, documents and vouchers may be retained or dealt with as the Court may think fit (*q*).

CHAP. V.

Investigation of books and vouchers.

Court's power over books &amp;c. in possession of assignee or trustee.

As to the control of the trustee by the official accountant, and the powers of the latter official, *vide* Part IV. of this division of Chapter V., *post*, "The Official Accountant."

Control of trustee by official accountant.

The creditors may by an ordinary resolution give directions as to the manner in which the property is to be administered by the trustee (*r*). The collection getting in, selling and disposing of the whole of the insolvent estate is subject to the directions of the creditors at a general meeting or of the committee of inspection, but the directions of the creditors at a general meeting override those of the committee (*s*). It is the duty of the trustee to conform to such directions unless the Court for some just cause otherwise orders (*t*). Where there are two trustees elected the creditors may declare that any act required or authorised to be done by the trustee is to be done by both or one of such persons (*u*).

Directions of creditors to trustee or assignee.

The trustee is not bound to obey a resolution of the creditors if it be contrary to the express provisions of the law, or of the principles on which the law has been interpreted, and as the Court will not act upon resolutions of creditors which are inequitable or beyond their powers, the Court may advise the trustee to refrain from taking a course prescribed by a resolution which comes within that category (*v*). In all cases when creditors vote at meetings they are bound to consider the interest of the whole body of creditors, and so to order the realisation of the estate as to obtain the largest dividend for them all. If they pass a resolution with any other motive it will be considered by the Court ineffectual to bind the trustee, who represents not the voters, but all who may share in the dividend (*w*). The Court

(*p*) *Ibid*.(*q*) S. 33 Act of 1897; as to books trustee is to keep, *vide* Division 4 of this Chapter, *post*.(*r*) S. 53 (4), Act of 1890.(*s*) S. 69, Act of 1890.(*t*) S. 53, *ante*, and *vide In re Mackay*, 3 A.J.R., 10.(*u*) S. 64, Act of 1890.(*v*) *In re Lempriere*, 3 A.L.T., 20.(*w*) *Ibid*, and *In re Thomson*, 2 A.L.T., 108.

**CHAP. V.** has power for just cause shown to direct the trustee to disregard the directions of the creditors and to act contrary to them. In such a case the Court ought not to order the resolution to be vacated or to declare it void, but simply direct the trustee to disregard it (*x*).

When a majority of the committee of inspection approved of a compromise of a claim, but at a subsequent general meeting of the creditors a resolution was carried refusing to accept it, and the trustee applied to the Court for leave to carry it out, the Court declined to over-rule the creditors' decision, as it had been come to *bond fide* and with a view to their own interests after due consideration (*y*).

Power of trustee or assignee to apply for advice of Court.

An assignee or trustee may apply to the Court or a judge upon a statement in writing verified by affidavit for the opinion, advice or direction of the Court or a judge on any question respecting the management of the insolvent estate, and notice of such application must be served upon, or the hearing thereof be attended by all persons interested or such of them as the Court or judge think expedient; and the assignee or trustee acting upon the opinion, advice or direction of the Court or judge is deemed to have discharged his duty in the subject matter of the application if he has not been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction.

Costs of application. Manner of applying for directions and hearing.

The costs of such application are in the discretion of the Court or judge (*z*). Where the trustee desires to apply to the Court for directions in any matter he may file an application in the form No. 86, Appendix, *post* (*a*). The Court will then hear the application or fix a day for hearing it, and direct the trustee to apply by motion (*b*).

Statement of accounts to be furnished by trustee at request of creditors. Form of statement.

The trustee must furnish the statement of accounts when required by a creditor, subject to and under the provisions of ss. 39 and 63, Act of 1897 (compare *Bankruptcy Act* 1890, s. 17), and r. 363. The form of such statement is No. 104, Appendix, *post*, with such variations as the case may require (*c*).

(*x*) *Ex parte Cocks, in re Poole*, 21 Ch. Div., 397.

(*y*) *In re Ridgway, ex parte Hurlbatt*, 6 Morrell, 277.

(*z*) S. 83, Act of 1890—compare 32

& 33 Vict., c. 71, s. 20, and the *Trusts Act* 1890, s. 60.

(*a*) R. 362.

(*b*) *Ibid.*

(*c*) R. 363.

The trustee must whenever required by any creditor so to do furnish and transmit to such creditor by post a list of creditors showing in such list the amount of debt due to each of such creditors, and showing which creditors have proved. The trustee may charge such creditor the sum of three pence per folio of seventy-two words together with the cost of postage for such list (*d*). CHAP. V.  
Trustee to furnish list of creditors.

The trustee must investigate the books, accounts and documents of the insolvent, and prepare therefrom a schedule and balance sheet of the insolvent's property, dealings and transactions so far as the said books and accounts offer materials for preparing the same, and file such schedule and balance sheet with the chief clerk as soon as practicable after the order for sequestration, and not later than one month thereafter or within such further time as upon application the Court may allow (*e*). The trustee must also together with the said schedule and balance sheet file a report as to the keeping of accounts by the insolvent, whether the insolvent has rendered and given him all necessary assistance and information in his power, whether any books, accounts and documents appear to have been missing, or to have been falsified or destroyed, the cause of the insolvency and whether any property appears unaccounted for (*f*). He must also at any time make such investigations and reports in connection with the insolvency as the Court may direct (*g*). Preparation of schedule and balance sheets of insolvent's property.  
  
Report as to insolvent's account.  
  
Investigations to be made by direction of Court.

After the order confirming his election or appointment has been made the trustee must collect, get in sell and dispose of the whole of the insolvent estate in such manner and at such times as he may think proper subject to the provisions of the Act, and the directions of the creditors at a general meeting, or of the committee of inspection as pointed out at p. 177, *ante* (*h*). Getting in and disposal of property.

The provisions as to attachment have been dealt with in the portion of this chapter relating to the assignee, *vide ante*, pp. 164-166, and the same are applicable to the trustee also. Attachment of estate.

The procedure to be adopted and the conduct of the trustee to be observed in the payment of moneys into and out of the bank are set out in Division 4 of this chapter. Payment of money into and out of bank.

(*d*) S. 38 Act of 1897—compare *Bankruptcy Act* 1890, s. 16.

(*e*) S. 40, Act of 1897.

(*f*) S. 41 (1), Act of 1897.

(*g*) *Ibid* (2).

(*h*) S. 69 Act of 1890, *ante*—compare *Bankruptcy Act* 1869, s. 20.

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Collection of debts.

In addition to his other remedies by suing, the trustee may by summons call upon any person alleged to be indebted to the insolvent estate to pay the amount of such indebtedness (i).

Subject to the provisions of the Act the trustee has power to do the following things (k):—

Receiving and deciding upon proofs of debt.

*He may receive and decide upon proof of debts in the prescribed manner and for such purposes administer oaths (l).—*

The trustee's duty as to proof of debt is dealt with in "Proofs of Debt," *post*. "Oath" includes affirmation and declaration (m).

Carrying on business of insolvent.

*The trustee may carry on the business of the insolvent so far as may be necessary for the beneficial winding-up of the same (n).—*Except so far as may be necessary for the beneficial winding-up of the business the creditors have no power to authorise the trustee to carry on the business of the insolvent, and if the majority of the creditors pass a resolution authorising the trustee to carry on the business for any other purpose the resolution does not bind the non-assenting minority and the Court may declare the resolution invalid (o). When the trustee carries on the business he must keep a distinct account of the business and incorporate in the books kept by him and so as to be easily discernible the total weekly amount of the receipts and payments on account of such business account (p), and the business account must from time to time and not less than once in every month be verified by a statutory declaration of the trustee, and the trustee must thereupon submit such account to the committee of inspection (if any) or such member thereof as may be appointed by the committee for the purpose (q). The trustee may appoint the insolvent to carry on the business for the benefit of the creditors on such terms as the creditors direct (r), and he may from time to time make such allowance to the

(i) *Vide* Chapter I., p. 6, *ante*.

(k) S. 85, Act of 1890—compare *Bankruptcy Act 1869*, s. 25.

(l) *Ibid* (1).

(m) *Acts Interpretation Act 1890*, s. 5.

(n) S. 85 (2), *ante*.

(o) *Ex parte Emmanuel*, in *re Batey*, 17 C.D. 35—compare *In re Wreck Recovery and Salvage Company*, 15 C.D., 353, and *In re East of England Banking Coy.*, L.R. 4 Ch., 14. As to creditors objecting to the carrying on of the

business of the insolvent, *vide Ex parte Goring*, 1 Ves., 169; *Ex parte Lyon*, 6 Ves., 617; 6 R.R., 1; *Ex parte Kendall*, 17 Ves., 514; 11 R.R., 122; *Ex parte Miller*, 1 M.D. & D., 39; and as to the Court interfering to prevent a sale, *vide Ex parte Montgomery*, *re Russell*, 1 Gl. and J., 338; *Re Atkinson*, 1 M.D. & D., 238.

(p) S. 62 (1), Act of 1897; r. 360.

(q) *Ibid* (2); r. 360.

(r) S. 86, Act of 1890.

insolvent as may be approved by the Court, the committee of inspection, or by resolution passed by a general meeting of creditors in consideration of his services if he is engaged in winding up the estate (s). This allowance must be in money unless the creditors by special resolution determine otherwise (t). CHAP. V.

*The trustee may bring or defend any action, suit, or other legal proceeding relating to the property of the insolvent (u).*—  
 The trustee of an insolvent may sue and be sued by the official name of “the trustee of the property of ——— an insolvent,” inserting the name of the insolvent, and by that name may hold property of every description, make contracts, sue and be sued, enter into any engagements binding upon himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office (v). Bringing or defending actions.  
Official name as to suing, contracts, and engagements.

As the trustee has power to bring actions he has the power to conduct them and can take all such steps in them as an ordinary litigant, and can therefore compromise actions which he has instituted (w), and he may take advice on any legal question affecting the insolvent estate or the administration thereof, and may employ an attorney or solicitor to commence, conduct or defend actions and suits, or any other proceedings for or against the insolvent estate, and may charge against such estate all fees allowed on taxation by the proper officer (x), subject to the limitation set out in s. 27, Act of 1897. As to costs, *vide* Chapter II., *ante*, at p. 66. Compromising actions.  
Trustee may take legal advice.  
Costs of litigation.

The trustee may, upon entering on the record a suggestion of the sequestration, take up and continue in his own name the process in any suit or action to which the insolvent may be a party (y), or discontinue the same as he shall see fit, and also on entering a like suggestion defend any suit or action pending against the insolvent relating to or affecting the insolvent estate (z). As to suits and actions pending.

Whenever an assignee or trustee resigns or is removed or dies, Proviso as to non-abatement

(s) S. 120, Act of 1890.

(t) R. 330.

(u) S. 85, *ante* (3).

(v) S. 64 (5), Act of 1890.

(w) *Leeming v. Murray*, 13 Ch. D., 123.

(x) S. 80, Act of 1890.

(y) That is the plaintiff party: *McAuley v. Beatty*, 12 V.L.R., at p. 644.

(z) S. 80, Act of 1890. As to s. 80 generally—compare 5 Vict. No. 17, ss. 56-59; 28 Vict. No. 273, ss. 64-65, 67.

CHAP. V. or a new assignee or trustee is appointed or elected and confirmed, no suit or action relative to the insolvent estate is thereby abated, but the Court in which any such suit or action is depending or any judge thereof may, upon the suggestion of such resignation, death or removal, and that a new assignee or trustee has been appointed or elected and confirmed, allow the name of the new assignee or trustee to be substituted in the place of the former, and the suit or action then proceeds as if such new assignee or trustee had originally commenced or defended the same (a).

Practice of the  
Supreme Court  
as to non-abate-  
ment of actions  
by insolvency.

Parties may be  
added there-  
under.

By the Supreme Court procedure (b), a cause or matter does not become abated by reason of the death or insolvency of any of the parties if the cause of action survive or continue, and in case of the death or insolvency of any party to a cause or matter the Supreme Court, or a judge thereof may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the trustee, or other successor in interest, be made a party or be served with notice in such manner and form as therein prescribed, and in such terms as the Court or judge may think just, and may make such order for the disposal of the cause or matter as may be just (c). And where by reason of the death or insolvency occurring after the commencement of a cause or matter, it becomes necessary or desirable that any person not already a party should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceedings be carried on between the continuing parties, and such new party or parties may be obtained *ex parte* on application to the Court or judge upon the necessary allegations (d). In an action to enforce an equitable mortgage given by the insolvent, the purchaser from the trustee being entitled to the equity of redemption, is a necessary party (e). In such a case where the trustee had also become insolvent, it was held unnecessary to have a new trustee appointed and made a party to the action (f).

As to actions by the trustee and insolvent's partner, and actions on joint contract, *vide* Chapter II., "Practice," at p. 43.

(a) S. 80. See prior note.  
(b) *Rules of the Supreme Court* (Judicature) 1884, Order 17, r. 1.  
(c) *Ibid* r. 2.  
(d) *Ibid*, Order 17, r. 4. The cases

under Order 17, rr. 1, 2 and 4 are collected under the respective rules referred to in the Annual Practice.  
(e) *Corbett v. Sullivan*, 19 A.L.T., 177.  
(f) *Ibid*.

The assignee or trustee is the proper person to institute proceedings on behalf of the estate, and it has been held that a creditor, on behalf of all the creditors, cannot do so on the assignee or trustee refusing to institute proceedings to set aside a settlement (g). Creditors may, where the trustee refuses to sue, apply to the Court for leave to use the trustee's name on giving him an indemnity where the proceedings are for the benefit of creditors generally, and not for a particular creditor (h). The alternative in such a case would be removal (i).

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Actions by creditor where trustee refuses to act.

*The trustee can deal with any property to which the insolvent is beneficially entitled as tenant in tail in the same manner as the insolvent might have dealt with the same; and Part VIII. of the Real Property Act 1890 extends and applies to proceedings in insolvency under the Acts as if it were re-enacted and made applicable in terms to such proceedings (k).*

Dealing with estates tail.

*And he may exercise any powers the capacity to exercise which is vested in him under the Acts, and execute all powers of attorney, deeds and other instruments expedient or necessary for the purpose of carrying into effect the provisions of the Acts (k).*

Exercise of powers and execution of deeds.

*He may sell all the property of the insolvent (including the goodwill of the business, if any, and the book debts due or growing due to the insolvent), by public auction or private contract, and if he thinks fit transfer the whole thereof to any person or company, or sell the same in parcels (l).*

Selling property of insolvent.

If the insolvent's interest consists of a debt or sum of money charged upon any land by way of equitable mortgage the proper course is for the trustee to apply to the Court, upon notice to all persons interested, for an order for the sale of the land comprised in such equitable mortgage (m), and an express order of the Court is necessary for the sale of the life estate in remainder of an insolvent, expectant on the death of any previous tenant for life with any remainder over to the insolvent's issue or the heirs of

Sale of land equitably mortgaged.

Sale of life estate before it falls into possession.

(g) *Douglas v. McIntyre*, 10 V.L.R. (E.), 249.

(h) *Ex parte Kearsley, in re Genese*, 17 Q.B.D., 1; and *Ex parte Cooper, in re Zucco*, 10 L.R. Ch., 510.

(i) *Vide In re Mackay*, 3 A.J.R., 10.

(k) S. 85 (4, 5) Act of 1890; s. 1 Act

of 1897.

(l) S. 85 (6), Act of 1890—compare 5 Vict. No. 15, s. 2; 7 Vict. No. 19, s. 15; 8 Vict. No. 15, s. 2; 10 Vict. No. 14, s. 3; 28 Vict. No. 273, s. 27.

(m) S. 101, Act of 1890.

**CHAP. V.** his body or any of them as purchasers, before it falls into possession (n). Where any portion of the property of the insolvent consists of stock, shares in ships, shares, or any other property transferable in the books of any company, office or person, the right to transfer such property is absolutely vested in the trustee to the same extent as the insolvent might have exercised the same if he had not become insolvent (o).

Transfer of stock  
shares, ships, &c.

Taking accounts  
of and sale of  
mortgaged  
property.

As to the taking accounts of property mortgaged and the sale thereof, *vide* rr. 88 to 92, inclusive, Appendix, *post*.

Sale where  
trustee is an  
auctioneer.

Where the trustee is an auctioneer he cannot by himself or any partner act as such in the sale of any of the property vested in him except by the leave of the Court (p).

Accounting by  
auctioneer or  
other agent to  
trustee.

Where the trustee sells through an auctioneer or other agent the gross proceeds of the sale must be paid over by such auctioneer or agent, and the charges and expenses connected with the sale must afterwards be paid to such auctioneer or agent on production of the necessary allocatur of the chief clerk (q). Auctioneer's charges are set out in the "Scale of Costs," Appendix, *post*. The trustee is accountable for the proceeds of every such sale (r). In the case of any sale by private contract the trustee's account must show the name, address and occupation of the purchaser and the mode in which the amount of the purchase has been arrived at (s).

Directions as to  
sales by private  
contract.

Sale by trustee  
who has become  
insolvent.

A sale of the interest of the original insolvent in land by a trustee who has himself become insolvent, and of which he is the registered proprietor, to a person who has no notice of his insolvency, is valid (t).

Giving receipts.

*He may give receipts for any money received by him, which receipt shall effectually discharge the person paying such moneys from all responsibility in respect of the application thereof (u).*

Proving debts,  
&c.

*He may prove rank claim and draw a dividend in the matter of the insolvency or sequestration of any debtor of the insolvent (v).*

(n) *Vide* s. 95, Act of 1890.  
(o) S. 81, *ibid.* *Vide post*, "Property  
Divisible amongst Creditors."  
(p) R. 364.  
(q) R. 328.

(r) *Ibid.*  
(s) S. 329.  
(t) *Corbett v. Sullivan*, 19 A.L.T., 177.  
(u) S. 85 (7), Act of 1890.  
(v) *Ibid* (8).



The trustee may, with the sanction of a special resolution of a general meeting of creditors or of the committee of inspection, do all or any of the things set out from I. to V. following. The sanction given for such purposes may be a general permission to do all or any of the enumerated things or a permission to do all or any of them in any specified case or cases (*w*).

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Powers of trustee requiring sanction of creditors or of the committee of inspection.

*I. Mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts* (*x*).

Mortgaging property.

*II. Refer any dispute to arbitration, compromise all debts, claims and liabilities whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the insolvent and any debtor or person who may have incurred any liability to the insolvent upon the receipt of such sums, payable at such times and generally upon such terms as may be agreed upon* (*y*).

Arbitrations and compromises with debts, and creditors, and claims.

*III. Make such compromise or other arrangement as may be thought expedient with creditors or persons claiming to be creditors in respect of any debts provable under the insolvency* (*z*).

*IV. Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the insolvent made or capable of being made on the trustee by any person, or by the trustee on any person* (*a*).

*V. Divide in its existing form amongst the creditors according to its estimated value any property which from its peculiar nature or other special circumstances cannot advantageously be realised by sale* (*b*).

Division of property in kind.

No person, however, dealing with any trustee or trustees under the Acts is bound to inquire whether such trustee or trustees has or have been required or authorised to do any particular act, or whether the sanction of a meeting of creditors or of the committee of inspection has been obtained as required by the Acts (*c*). The effect of a similar provision in the Act 28 Vict., No. 273,

Exoneration to persons dealing with trustee.

Scope of proviso.

(*w*) S. 87, Act of 1890—compare 32 & 33 Vict. c. 71, s. 27.

(*x*) S. 87 (1), *ibid*.

(*y*) *Ibid* (2).

(*z*) *Ibid* (3).

(*a*) *Ibid* (4.)

(*b*) *Ibid* (5).

(*c*) S. 64 Act of 1890—compare 7

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s. 27, was said by the Full Court (*d*), and agreed in by the House of Lords in respect to its protective effect (*e*), to enable a purchaser to take for granted that all things had been prepared necessary to justify the assignee in exercising a power with which in the performance of them he is unquestionably clothed, as for instance, the notice prescribed by s. 71 of that Act, but not to cover or protect transactions altogether outside the Act, such for example, as a conveyance of the estate in consideration of some personal benefit to the trustee or his family. The trustee is not exonerated if he omit to comply with any of the provisions of the Acts (*f*).

Statements  
books  
accounts and  
audit.

As to statements to be supplied by the trustee, as to the books to be kept by him, and his duties as to accounts, and also as to the audit, *vide* Division 4 of this Chapter, "Distribution of Estate, Books, Accounts and Audit," *post*.

Liability of  
assignee or  
trustee for  
money, &c.,  
received and  
claimed by  
others.

Course for  
assignee or  
trustee to adopt.

The assignee or trustee is not personally answerable for or by reason of his having received any:—(A) Money; (B) Bills, notes or other negotiable instruments in his character of assignee or trustee—provided he has paid or deposited such in some bank to his credit as assignee or trustee of the insolvent estate to which they belong and has given notice of such payment or deposit (as the case may be) to the person claiming such money, bills or other negotiable instruments from the assignee or trustee, and that he has not dealt with them otherwise than in the execution of his duty as assignee or trustee, and if an action be brought against any assignee or trustee for any such act done by him or by his order or authority in the execution of his duty either solely or where there are two trustees by a trustee jointly with any other trustee in respect of such money, bills, notes, or other negotiable instruments, the Court in which the same is brought, or a judge thereof, may upon application of the assignee or trustee, and upon an affidavit of facts set aside the proceedings in such action so far as the assignee or trustee is concerned with such costs or without costs as to the Court or judge seems meet (*g*). In a case (*h*)

Vict. No. 19, s. 15; 10 Vict. No. 14, s. 3; and 28 Vict. No. 273, s. 27. S. 1 Act of 1897.

(*d*) *Vide Melbourne Banking Corporation Ltd. v. Brougham*, 4 App. Cas., 157.

(*e*) *Ibid*, at p. 170.

(*f*) S. 64, Act of 1890.

(*g*) S. 91, Act of 1890—compare s. 41, Bankruptcy Act 1849.

(*h*) *In re Sweeney, ex parte Diggins*, 4 V.L.R. (I.), 1.

where the assignee received a sum of money on which two persons claimed, a landlord and a bill of sale holder, the latter was paid by the assignee and the landlord was left to claim against a lodgment respecting his claim only. The correct course would have been to follow the above provision by paying the whole of the proceeds into the bank, leaving each to claim against it, and thus obtain its protection.

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Procedure if sued.

As to the trustee's liability as to costs, *vide* Chapter II., p. 66, *et seq.*

Liability as to costs.

Any assignee or trustee becoming insolvent and being indebted to the estate of which he was assignee or trustee in respect of any sum of money improperly retained or employed by him, if he obtains his certificate, is not discharged thereby as to his future effects in respect of the said debt (*i*).

Liability to estate by assignee.

A trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust or which has a tendency to interfere with his duty (*k*), such as the purchase of any part of the estate, however pure his motive (*l*); and it is now expressly provided that neither the trustee nor any member of a committee of inspection while so acting, without the express sanction of the Court or three-fourths in number and value of the creditors, can purchase either directly or indirectly by himself or his wife or his employer or any partner, clerk, agent or servant any part of the estate or derive any profit or advantage from any transaction arising out of the insolvency (*m*). The sanction of the Court cannot be given after the profit has been derived, but must be obtained before the business from which the profit is to be derived is undertaken (*n*). The partner of the trustee it appears may buy on his own account exclusively (*o*). A sale of all the debtor's estate to the trustee was sanctioned by the Court where the creditors had agreed to it after the property had been put up for sale and failed to find a purchaser (*p*).

Fiduciary character of trustee. Dealings with estate.

(i) S. 151, Act of 1890—compare 5 Vict. No. 17, s. 98; *vide* also Chapter VIII., *post*, "Certificate of Discharge."

(k) Story's Equity Jurisprudence (Eng. Ed.), 209, and cases therein cited.

(l) *Ex parte Badcock, re Gundry*, Mont. & McA., 231; and *Ex parte Theaites, re Knowles*, 1 Mont. & A., 323.

(m) *Vide* s. 51, Act of 1897, and also

s. 52, *ibid*, as to further dealings with the estate by the trustee or member of committee. Compare rr. 316, 317 *Bankruptcy Rules* 1886.

(n) *In re and ex parte Gallard*, (1896) 1 Q.B., 68; 2 Manson, 515.

(o) *In re Gallard*, (1897) 2 Q.B., 8; 4 Manson, 52.

(p) *Vide Ex parte and re Wainwright*, 19 C.D., at p. 140; and *Ex parte and*

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Power of Court  
as to such  
dealings.

The Court may set aside or otherwise deal with as may be deemed just any purchase or transaction made contrary to the provisions of s. 51, referred to, on the application of any person interested or without any application, and in the like manner the Court may make any order it may think just in case of any purchase or sale made contrary to the provisions of s. 52, referred to (q). The sanction of the committee of inspection does not prevent the application of principles applicable to trustee in his fiduciary position (r).

Wrongful acts  
of messenger.  
Proper and  
improper  
warrants.

The assignee or trustee is not liable for the wrongful acts of his messenger in the execution of a warrant issued by him so long as he has not issued his warrant against the wrong person. There is a distinction between the position of the sheriff and the assignee. The former receives a writ which he is bound to execute in person, and if he chooses to delegate his duty he takes all the risk. The assignee issues the warrant to other people to execute, and if it is against the goods of the proper person, he is not answerable for what the bailiffs do (s). The trustee, it is presumed, should exercise proper care in the selection of his bailiff. The assignee or trustee cannot under s. 65 of the Act enter the house of a third person and take property of the insolvent, and close up the house against the owner (t). The assignee or trustee in such a case should obtain a warrant of the Court under s. 66, Act of 1890 (t).

Improper  
retention of  
money by  
trustee.

As to the improper retention of money by the trustee, and his liability as to such, *vide* Division 4 of this Chapter, *post*.

Loss by agents.

Trustees must not be negligent in the employment of other persons to assist them in the administration and realization of the estate, but in the absence of blameable negligence they are not responsible for loss sustained in the proper employment of third persons in the common usage of business (u), but if the agents are not employed in the common usage of business the trustee is liable for their defaults (v).

*re Moore*, 45 L.T., 558, as to sale to trustee's partner.

(q) Ss. 51 and 52, Act of 1897.

(r) *Ex parte Forder, re Sparks*, W.N. (1881), p. 117.

(s) *Willett v. Turner*, 1 V.L.R. (L.), 294.

(t) *Chapman v. Carolin*, 20 V.L.R.,

at p. 73.

(u) *Ex parte Turner, in re Evans, M. & McA.*, 52; *Ex parte Griffin, in re Dixon*, 2 Gl. & J., 114; and *vide Ex parte Wilkinson*, Buck, 197.

(v) *Vide The Earl of Lichfield*, 1 Atk., 87.

When two trustees are appointed, one is not liable for the improper act of the other, unless he knowingly permits it, and therefore in the case of improper retention of money by one, the other cannot be charged with the penalties of the Act dealing therewith unless he knowingly permitted it (*w*). If a course of management of the estate is adopted by the trustees which leads to loss, either through the dishonesty or otherwise of one of the two, the other is liable (*x*).

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Liability for  
co-trustee's  
acts.

Where there is more than one trustee, it has been held that each is only answerable for what he receives (*y*), and receipts for payments apparently should be signed by all the trustees, if more than one, to make such unquestionable (*z*).

In the absence of sufficient assets in the estate, the trustee is personally liable for rent until he gives up possession to the landlord, as the insolvent's interest in the premises is vested in the trustee by virtue of the Acts, and cannot be got rid of until disclaimed under the provisions of s. 84, Act of 1890 (*a*).

Personal  
liability of  
trustee for rent.

#### 4. THE OFFICIAL ACCOUNTANT.

The Official Accountant is an officer of the Insolvency Court (*b*) of a similar class to the Comptroller under the provisions of the English *Bankruptcy Act* 1869 and the accountant in bankruptcy under 19 & 20 Vict. c. 79 (Scotland), and his duties may be compared in some instances with those of the Board of Trade under the *Bankruptcy Acts* of 1883 and 1890. He is appointed, removed, or suspended by the Governor-in-Council subject to the *Public Service Act* (*c*).

Appointment,  
removal or  
suspension.

All Courts and all persons judicially acting must take judicial notice of his signature (*d*).

Judicial notice  
of signature.

(*w*) *Ex parte Benham, in re Branwell*, 2 M. & A., 272.

(*x*) *Ex parte Booth, in re Miles*, Mont., 248.

(*y*) *Primrose v. Bromley*, 1 Atk., 89.

(*z*) *Can v. Read*, 3 Atk., 195, and *vide Bristow v. Eastman*, 1 Esp., 172, where it was thought the receipt of one of two was sufficient.

(*a*) *Brasher v. Davey*, 12 V.L.R., 343.

(*b*) S. 66, Act of 1897.

(*c*) *Ibid.* He must be a member of the public service ("Public service" here extends to and includes railway service

and service in any office or employment whatever in Victoria for which payment is paid by the Crown out of any special appropriation of the consolidated revenue, or a person who, having been in the public service, is in receipt of a superannuation or retiring allowance), unless the Public Service Board certifies in writing that there is no such person available and competent to fulfil the duties of such office. The office may be held in conjunction with any other office in the public service. *Ibid.*

(*d*) *Ibid.*

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Duties as to attendance at Court and as to audits, &c., directed by Court.

The official accountant must attend the Court whenever it directs, and he must at all times make such audits, investigations, and inquiries in regard to any proceedings under the Acts and report thereon as the Court directs; and he must generally, in addition to the duties expressly imposed upon him by the Act of 1897, perform all such duties as may be prescribed by rules or specially directed by the Court (e).

Duties in respect to the chief clerk.

He may at any time require the production of and inspect any books or accounts kept by the chief clerk, and he must audit all books and accounts of such official once at least every six months, and for the purpose of such audit the chief clerk must furnish the official accountant with such vouchers and information as he requires (f).

Duties as to trustees.

Matters which the official accountant must take cognisance of.

The official accountant must take cognisance of—(1) All matters relating to the appointment, security, and conduct of assignees and trustees in relation to estates in insolvency, liquidation by arrangement, composition, or deeds of arrangement within the meaning of Part VI., Act of 1897 (g). (2) The Insolvency Estates Account (h) and every account which a trustee has at a bank in relation to an estate, the Unclaimed Dividend Account, the Insolvents' Suitors' Fund, and all books, vouchers, and documents relating thereto (i).

Report to Court.

He must immediately report in writing to the Court any contravention of the provisions of the Insolvency Acts in relation to the matters set out as above (1), and he must also report to the Court any contravention of the Insolvency Acts by any person in relation to any of the said accounts or funds referred to in (2) (k).

Official accountant entitled to notice of creditors' meeting under s. 53, Act of 1890.

The official accountant is entitled to notice from the assignee of the meeting of creditors held under s. 53, Act of 1890. The form of such notice is 41, *post* (l).

Official accountant's position as to registration of trustees,

and may oppose registration,

The official accountant is entitled to notice in writing from the applicant for registration as trustee or some solicitor on his behalf of his intention to apply to be so registered (m), and he may, without notice to the applicant, oppose such application (n), and applica-

(e) S. 68, Act of 1897.

(f) S. 69, *ibid.*

(g) S. 67, Act of 1897—compare s. 91, *Bankruptcy Act* 1883, and r. 251 under the *Bankruptcy Act* 1869.

(h) *Vide* Division 4 of this chapter,

*post.*

(i) S. 72, *ibid.*

(k) Ss. 67 and 72, Act of 1897.

(l) R. 256.

(m) R. 333.

(n) R. 336.

tion to cancel any registration of a trustee under ss. 17 and 18, **CHAP. V.**  
 Act of 1897, may be made to the Court at any time by him (o).

and may apply  
 for cancellation  
 of same.

Official account-  
 ant's position as  
 to security.

The security to be given by a trustee under the Acts is in the form of a bond to be executed to the official accountant to enure for the benefit of the official accountant for the time being his successors and assigns, with two sufficient sureties to be approved of by the chief clerk, conditioned for the faithful and sufficient performance and execution from time to time of all and singular the duties required of him as trustee by the *Insolvency Acts* or any rule of Court made or hereafter to be made. Such bond is in the form No. 32 in the Appendix (p). The official accountant may assign the bonds under the Court's order as provided by r. 347.

He must also examine all statements, accounts, vouchers and documents filed by the trustee, and he must call the trustee to account for any misfeasance, neglect or omission which may appear on or from such statements, accounts or vouchers or documents or otherwise, and may in writing require the trustee to make good any loss the estate of the insolvent may have sustained by such misfeasance, neglect or omission. If the trustee fail to comply with such requisition, the official accountant may report the same in writing to the Court, and the Court, after hearing the explanation, if any, of the trustee must make such order in the premises as it thinks just (q). He may also, at any time, require any trustee or assignee to answer any inquiry made by him in relation to any insolvency in which such trustee or assignee is engaged, and he may also investigate the books and vouchers of the trustee or assignee (r).

Examining of  
 trustee's filed  
 accounts.

Power to call  
 trustee to  
 account.

Report to Court  
 as to trustee's  
 failure as to  
 such.

Power to make  
 inquiries of trustee  
 or assignee  
 and investigate  
 their books, &c.

The official accountant may if he thinks fit apply to the Court to examine on oath the trustee or assignee in relation to any insolvency in which such trustee or assignee is engaged or any other person as to such (s).

Power to apply  
 to Court for  
 examination as  
 to such.

The trustee must submit the record-book and cash-book together with any other requisite books and vouchers to the official accountant when required (t), and every trustee must, at the

Power to inspect  
 record, cash and  
 other books and  
 vouchers.

(o) R. 337.

(p) R. 338.

(q) S. 70, Act of 1897—compare s. 57, *Bankruptcy Act* 1869.

(r) S. 71, *ibid.*

(s) *Ibid.*

(t) R. 319.

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Audit of  
trustee's  
accounts.

expiration of six months from the date of his appointment, and at the expiration of every succeeding six months thereafter, transmit to the official accountant the record-book together with any original resolutions of the creditors or committee of inspection not entered in the record book, and a duplicate copy of the cash-book for such period verified by affidavit, together with the vouchers for all payments and allocations for taxable charges and copies of the certificates of audit by the committee of inspection (if any), and he must also forward, with the first accounts, one office copy of lists A, D, E and F of the insolvent's schedule or of sheets B, C, F, G and H of the debtor's statement of affairs showing thereon respectively, in red ink, the amounts realised, and explaining the cause of the non-realisation of such assets as may be unrealised. The trustee must also at each audit forward to the official accountant a report on the position of the estate, and when the estate has been fully realised and distributed he must forthwith send in his accounts to the official accountant, although the six months may not have expired. The accounts sent in by the trustee must be certified and verified by him according to the Form No. 99 in the Appendix (u). When the trustee's account has been audited the official accountant must certify that the account has been duly passed and thereupon the duplicate copy bearing a like certificate must be transmitted to the chief clerk, who must file the same with the proceedings in the sequestration (v). Where a trustee has not since the date of his appointment or since the last audit of his accounts, as the case may be, received or paid any sum of money on account of the debtor's estate he must, at the period when he is required to transmit his estate account to the official accountant, forward to him an affidavit of no receipts or payments (w).

Official  
accountant's  
certificate of  
audit.

Affidavit as to  
no receipts.

Audit as to  
dividends paid  
through local  
bank.

Custody of  
undelivered  
cheques.

If a dividend has been paid through a local bank the vouchers for the dividends paid and a list of those remaining unpaid are sent to the official accountant for audit by the trustee at the expiry of six months from the date of its declaration (x), and if a dividend has been paid by cheques on the insolvency estates account the trustee, on the expiration of six months from the date of issue or an application for his release, if that event occurs

(u) R. 321.  
(v) R. 322.

(w) R. 323.  
(x) R. 248.



earlier, must forward to the official accountant any cheques remaining in hand (y). CHAP. V.

Each trustee has, within fourteen days after the 31st of December in each year, to transmit to the official accountant a statement according to the form No. 178 in the Appendix, *post*, verified by affidavit of every insolvency or liquidation in which he is a trustee, and it is the duty of the official accountant to preserve such returns in his office and the returns may be searched by the public. Any trustee who fails to make such return may be removed from his office by the Court at the instance of the official accountant (z), or be subject to such order and to such costs as the Court may think proper to make (a).

Duty of official accountant as to annual returns of trustee, and power to apply for removal of trustee.

For the purposes of s. 127, Act of 1890, and s. 60, Act of 1897, the official accountant may, at any time, require the trustee under any insolvency, liquidation or composition to submit to him an account, verified by affidavit, of the sums received and paid by him, and may apply to the Court for an order directing the trustee to pay any unclaimed or undistributed moneys arising from the property of the debtor, in the hands or under the control of such trustee, into the insolvency unclaimed dividend fund in accordance with the terms of the sections referred to (b). The costs of such application are in the discretion of the Court (c).

Power as to unclaimed funds.

Power to apply to Court as to such.

Costs of application.

Upon a trustee resigning or being released or removed from his office he must deliver over to the official accountant, or as the case may be, to the new trustee all books kept by him and all other books, documents and papers and accounts in his possession relating to the office of trustee (d).

Right of official accountant to books &c. on resignation of trustee.

The official accountant, or any creditor who has proved his claim may, without notice to the trustee, oppose the trustee's application for leave to resign (e). Where the official accountant is of opinion that any act done by a trustee or any resolution passed by a committee of inspection should be brought to the notice of the creditors for the purpose of being reviewed or otherwise, the official accountant may summon a meeting of creditors accordingly to consider the same, and the expense of summoning

Power to oppose trustee's application to resign.

Power to summon creditors to consider conduct of trustee.

(y) R. 247.  
(z) Or of any creditor.  
(a) R. 354.  
(b) R. 448.

(c) *Ibid*  
(d) R. 325.  
(e) R. 357.

**CHAP. V.** such meeting must be paid by the trustee out of any available assets under his control (*f*).

Power to act as trustee or assignee in sudden emergency.  
Power to act as committee of inspection.

In any case of sudden emergency where there is no trustee or assignee capable of acting any act or thing required or authorised to be done by a trustee or assignee may be done by the official accountant (*g*). Where there is no committee of inspection any functions of the committee of inspection may be exercised by the official accountant (*h*). The costs and expenses which the official accountant may have to pay or to which he may be put in doing any act or thing under either of the two last preceding rules must be paid out of the estate of the debtor (*i*).

Costs relating to above acts.

Powers of official accountant as to insolvents.

As to certificate.

May oppose dispensation.

As to release.

The official accountant may without notice to the insolvent oppose the insolvent's application for a certificate (*k*). The Court may make such order as to costs incurred by the official accountant in such application as it may think fit (*l*). The official accountant may report to the Court in writing as to the conduct and affairs of the insolvent. On the hearing of an application by an insolvent for a certificate of discharge, if the same be not opposed, the Court may take into consideration, *inter alia*, such report (*m*). The official accountant may be heard in opposition to the application of an insolvent to dispense with the condition mentioned in s. 139, Act of 1890, and he is entitled to twenty-one days' notice of such application (*n*), and he may without notice be heard in support of or opposition to the insolvent's application for a release under ss. 131, 132, Act of 1897 (*o*). He is entitled to have notice served upon him thirty days before the hearing of the application (*p*).

Power to requisition information as to insolvent's earnings and after-acquired property.

Where an insolvent has not obtained a certificate of discharge, or where he has obtained a certificate of discharge subject to any condition as to his future earnings or after-acquired property, or subject to the suspension of such certificate either for a specified time or until such dividend as the Court may fix has been paid to the creditors, it is his duty until he obtains a certificate of discharge, or until such condition is satisfied, or until the period of suspension has expired, or until such dividend is paid (as the

(*f*) R. 372.

(*g*) R. 373.

(*h*) R. 374.

(*i*) R. 375.

(*k*) R. 300.

(*l*) R. 311.

(*m*) R. 299.

(*n*) R. 306.

(*o*) R. 197.

(*p*) R. 196 (2).

case may be), from time to time to give the official accountant such information as the official accountant may require with respect to his earnings and after-acquired property and income or rights to property or income (*q*).

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The extraordinary resolution for liquidation by arrangement or composition and statement of the debtor's affairs and all other proceedings when filed or registered must be at all times open for inspection by the official accountant (*r*). The official accountant is entitled to seven days' notice of the appointment by the Court of the day for considering a composition, and he may be heard by the Court as to the same without notice (*s*).

Power to inspect extraordinary resolution in liquidation and composition.  
Official accountant may be heard by Court on consideration of composition.

A subpoena for the attendance of a witness may be issued by the Court at the instance of the official accountant in terms of r. 73.

Power to cause subpoena to be issued.

The official accountant can requisition a bill of costs from every person whose bill or charges is or are to be taxed. Payment for such copy at the rate of sixpence per folio may be charged to the estate. If there are any items which in his opinion ought to be disallowed or reduced it is his duty to call the attention of the chief clerk to the same (*t*).

Power of official accountant as to costs.

## 5. THE COMMITTEE OF INSPECTION.

The creditors at a general meeting held under the provisions of s. 53, Act of 1890, may by resolution appoint some fit persons other than the trustee or trustees elected, not exceeding five in number, and whether creditors or not, to form a committee of inspection for the purpose of superintending the administration by the trustees of the insolvent's property, and such appointment must be made by a majority in number and value of creditors assembled at the meeting (*u*); and the creditors may by resolution fix the quorum required to be present at a meeting of the committee of inspection (*v*). Where the creditors neglect by resolution to fix the quorum required to be present at a meeting

Appointment.

Quorum.

(*q*) S. 99, Act of 1897; and *vide* r. 312. The Court or the trustee may requisition the like information. *Ibid*.

(*r*) R. 406.

(*s*) R. 441.

(*t*) Rr. 150, 151.

(*u*) S. 53 (3), Act of 1890; s. 64 (a), Act of 1897.

(*v*) S. 64 (7), Act of 1890. *Vide* however s. 64, Act of 1897, referred to by note (*z*) at p. 196.

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of the committee of inspection the quorum is three, or if the number of the committee of inspection be less than three the quorum is the whole number (*w*).

## Remuneration.

The creditors, it is implied under s. 65, Act of 1897, may vote remuneration to the members of the committee at the time of their appointment, but no member of the committee except by the sanction set out in the section referred to is entitled to derive any other remuneration, profit, advantage or payment, and r. 371 provides that where the sanction of the Court under the section is obtained the order of the Court must specify the nature of the services rendered, and that it shall only be given where the service performed is of a special nature. The rule, which is adapted from r. 68, *Bankruptcy Rules* 1890, also provides that no payment shall under any circumstances be allowed to a member of the committee for services rendered by him in discharge of the duties attaching to his office as such.

## Creditor must prove before acting.

Meetings of committee.  
Committee act by a majority.

Where a creditor is appointed a member he is not qualified to act and cannot act until he has proved his debt and the proof has been admitted (*x*). The committee must meet at such times as they from time to time appoint, but, failing such, at least once a month. The trustee or any member may call a meeting of the committee as and when he thinks necessary (*y*). They may act by a majority of members present at the meeting, but they must not act if a majority of the committee is not present (*z*).

## Resolutions of committee.

## Resignation and removal of member.

## Vacation of office.

Resolutions of the committee must be passed unanimously or by a majority in number of the members present at the meeting (*a*). By r. 372, the official accountant has power to summon a meeting of creditors to consider any resolution which he thinks should be brought to their notice. Any member of the committee may resign his office by notice in writing signed by him and delivered to the trustee (*b*); and any member may be removed by an ordinary resolution at any meeting of creditors of which the prescribed notice has been given stating the object of the meeting (*c*). If any member compounds or arranges with his creditors, or if his estate is sequestrated, or if he is absent for

(*w*) R. 370.(*x*) S. 64, Act of 1897—compare  
*Bankruptcy Act* 1883, s. 22.(*y*) *Ibid.*(*z*) *Ibid.*(*a*) R. 370.(*b*) S. 64 (6), Act of 1890.(*c*) *Ibid.*, 8.

three consecutive meetings of the committee, his office thereupon becomes vacant (*d*). CHAP. V.

On any vacancy occurring in the office of a member of the committee by removal, death, resignation or otherwise, the trustee must convene a meeting of creditors for the purpose of filling up such vacancy (*e*), but the continuing members of the committee may act, notwithstanding any vacancy in their body, and where the number of members is, for the time being, less than five, the creditors may increase that number so that it do not exceed five (*f*). No defect or irregularity in the election of a member of the committee vitiates any act *bonâ fide* done by him, and no act or proceeding of the trustee or of the creditors is invalid by reason of any failure of the creditors to elect all or any members of the committee (*g*).

Filling up vacancies.

Power for continuing members to act.

Power of creditors to increase number of committee to five if less.

Proviso as to defect of election, &c.

Where there is no committee of inspection any act or thing or any direction or consent by the Acts authorised or required to be done or given by such committee, may be done or given by the Court or a judge on the application of the trustee (*h*), and where there is no such committee any functions of the committee of inspection may be done by the official accountant (*i*). Though the committee is appointed for the purpose of superintending the administration by the trustee of the insolvent's property (*k*), and the trustee may, under its sanction, do all the things referred to in s. 87, Act of 1890, it is expressly provided that the directions of the creditors at a general meeting override those of the committee (*l*). The directions of the committee, like those of the creditors, may be disregarded by the trustee, if the Court think fit to so direct, on an application by the trustee for advice (*m*). As well as superintending the administration by the trustee the committee may approve of the trustee making an allowance to the insolvent out of the estate for the support of the insolvent and his family or in consideration of his services if he is engaged in winding up the estate (*n*).

Power of Court or judge and of official accountant where no committee appointed.

Scope of committee.

The committee may appoint the trustee, when the creditors

Power to appoint trustee.

(*d*) S. 64, Act of 1897; and *vide* s. 64 (12), Act of 1890.

(*e*) S. 64 (9), Act of 1890.

(*f*) *Ibid* (10).

(*g*) *Ibid* (11).

(*h*) *Ibid* (13). S. 1, Act of 1897.

(*i*) R. 374.

(*k*) S. 53 (3), Act of 1890.

(*l*) S. 69, *ibid*.

(*m*) *Vide* application to Court for advice, *ante*, at p. 178.

(*n*) S. 120, Act of 1890.

**CHAP. V.** delegate such power to it, either in the first instance or on a vacancy (o).

Power as to trustee's books and documents.

Duties as to audit of cash book.

As to countersigning cheques.

As to trading account of trustee.

When required, and not less than once in every three months, the trustee must submit the record book and cash book together with any other requisite books and vouchers to the committee (p), and it is the duty of the committee not less than once every three months to audit the cash book and certify therein under their hands the day on which the same was audited (q). The form of such certificate is form 100, Appendix, *post*, with such variations as circumstances may require (r). It is also the duty for at least one member of the committee in the absence of any other direction to countersign cheques under r. 376, and where the trustee is carrying on the business of the insolvent his trading account, verified by his statutory declaration, must be submitted to the committee or an appointed member thereof, who must examine and certify the same (s).

As to dividends.

The committee may, if necessary in its opinion and in that of the trustee, postpone the payment of a dividend (t).

Power to authorise certain acts of the trustee.

The committee may authorise the trustee to perform the acts set out in s. 87, Act of 1890, and as to such, *vide* p. 185, *ante*.

Profit cannot be derived from estate unless sanctioned.

Except under and with the express sanction of the Court, or by a resolution of three-fourths in number and value of the creditors present at a meeting specially convened for the purpose, a member of the committee cannot directly or indirectly by himself or his wife or any employer, partner, clerk, agent or servant derive any profit or advantage from any transaction arising out of any insolvency while he is a member of such committee, or receive out of the estate any payment for services rendered in connection with the administration of it other than the amount voted by the creditors at the date of their appointment (u). If it appears that any profit or payment has been made contrary to this provision the Court may disallow such payment or direct payment into Court of such profit (as the case may be) on the audit of the trustee's account (v).

Court may disallow profit or payment.

(o) S. 53 (1), Act of 1890 ; s. 31 (3), Act of 1897.  
 (p) R. 319.  
 (q) R. 320.  
 (r) *Ibid*.  
 (s) R. 360 (2)—compare s. 62 (2), Act

of 1897.

(t) R. 241 (5).

(u) S. 65, Act of 1897—compare r. 317, *Bankruptcy Rules* 1886.

(v) *Ibid*.

The sanction of the Court cannot be given after the profit has been derived, but must be obtained before the business from which the profit is to be derived is undertaken (*w*). The order of the Court must specify the nature of the services, and the sanction must only be given where the service performed is of a special nature (*x*).

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Time for  
sanction.  
Nature of order  
sanctioning.

A member of the committee of inspection is under the same restriction as a trustee as to dealings with the estate relative to deriving profit or advantage and as to purchases or sales in connection with estate property, as set out in ss. 51 and 52, Act of 1897. *Vide ante*, at p. 187. The provision as to such is not infringed by a partner of a member of the committee purchasing on his own account (*y*).

Dealings with  
estate as to  
profit and  
purchase.

#### 6.—THE POLICE MAGISTRATE.

The Act of 1897 has conferred powers upon Police Magistrates in reference to the holding of examinations and other matters as herein set out. As to examinations, any Police Magistrate at the city, town or place where the proceedings in any estate are conducted, if he is satisfied on the written application of the assignee or trustee that it is necessary or expedient in order to prevent unnecessary expense or delay or for any other reasonable cause so to do, has and can exercise all the powers which the Court had under ss. 134, 135, 136 and 137 of the Act of 1890 before the commencement of the Act of 1897 (*z*).

As to  
examinations.

The law and practice relating to the examination of the insolvent and witnesses and as to the committal of witnesses is set out in Chapter VII, *post*, "Examinations."

The advertisement and other notification of and the mode of conducting any examination before a Police Magistrate must be as nearly as practicable the same as if such examination took place before the Court (*a*).

Advertisement  
of examination.

The Police Magistrate must sign all evidence given before him and forthwith transmit the same, together with any documents

Signing of and  
forwarding of  
evidence and  
exhibits.

(*w*) *Ex parte and re Gallard*, (1896)

1 Q.B., 68; 2 *Manson*, 67 and 515.

(*x*) R. 371.

(*y*) *Ex parte and re Gallard*, 4 *Man-*

son, 52.

(*z*) S. 112, Act of 1897.

(*a*) *Ibid.*

**CHAP. V.** or other exhibits produced in evidence before him, to the Court (b). The Court has, in relation to an examination taken before a Police Magistrate, all the powers, authority and jurisdiction as to ordering payment of any debt or the delivery of any property and as to costs and otherwise which it would have had if such examination were had before the Court (c).

Powers of Court as to such examinations.

Any order made by a Police Magistrate under the powers conferred by s. 112, Act of 1897, is subject to appeal therefrom as if such order were made by the Court, and all the provisions of the Acts relative to appeal are applicable thereto (d). As to appeals generally, *vide* p. 19 *et seq.*, *ante*.

Appeals from orders made by a Police Magistrate.

Power of Police Magistrate as to the authorisation of urgent claims.

Where, upon the written application of the assignee or trustee, it is made to appear to a Police Magistrate at the place where the proceedings in any estate are conducted, (A) that it is necessary to meet any urgent claims properly incurred by the assignee or trustee in such estate; and (B) that it would cause undue delay, expense or hardship to make such application to the Court; and (C) that a sufficient sum is standing to the credit of such estate in "The Insolvency Estates Account," such Police Magistrate may, if he thinks fit, order such payments out of the amount standing to the credit of the estate as appear to him to be necessary (e).

Notification of same to chief clerk.

The Police Magistrate making the order referred to must forthwith notify the same to the chief clerk (f).

## DIVISION 2.

### 1. VESTING OF ESTATE.

**Vesting clauses.** The order of sequestration vests in the assignee absolutely the property of the insolvent of or to which he is then seised, possessed or entitled, or of or to which he may become seised, possessed or entitled before he obtains his certificate under the

(b) S. 112, Act of 1897.

(c) *Ibid.*

(d) *Ibid.*

(e) S. 54, Act of 1897. As to "The

Insolvency Estates Account," *vide* s. 54 (1), *ibid.*, and Division 4 of this Chapter, *post*.

(f) *Ibid.*



Act (g). By the Act of 1897, s. 50, the assignee or trustee can make no claim to any estate or interest in any land belonging to any insolvent after the expiration of twenty years from the date of the sequestration of the estate. Unless there is an offence against the insolvency law or against some law in favour of creditors the assignee or trustee is generally in no better position than the insolvent, and is merely his legal representative, with such rights as he would have had if not insolvent and no other (h). The assignee therefore takes the property subject to any mortgage registered or unregistered (i). Nevertheless, in respect to encumbered real or personal estate the position of the trustee varies from that of the insolvent, inasmuch as he can before maturity of the incumbrance tender or pay the money secured or perform any other necessary condition, and after such tender, payment or performance the property may be sold and disposed of for the benefit of the creditors (k). The broad and general principle is that the trustee takes the property subject to all the liabilities which affect it in the insolvent's hands, unless he takes the property under some particular provision such as the order and disposition clause (l). The order of the Court confirming the election or appointment of a trustee divests the assignee and vests the estate in the trustee (m), and operates as an unimpeachable transfer of the estate (n). The order confirming the election or appointment of a trustee is an order of the Court, and must be drawn up as such (o). It is signed by the chief clerk, and a copy thereof certified to by a judge or chief clerk is received and taken by all Courts of Justice in Victoria as conclusive evidence of the appointment and confirmation (p). It is not proof of the sequestration or of the facts of which an order of sequestration is evidence (q).

CHAP. V.

Limitation of claim by trustee.

Assignee or trustee mere legal representative of the debtor.

Nature of order confirming trustee.

"Property" means and includes money, goods, things in action, land and every description of property, whether real or personal, also obligations, easements and every description of estate interest and profit, present or future, vested or contingent, arising out of

(g) S. 50, Act of 1890.

(h) *In re Mapleback, ex parte Caldecott*, 4 C.D., at p. 156.(i) *Vide Fraser v. Australian Trust Company*, 3 A.J.R., 1, 83.

(k) S. 93, Act of 1890.

(l) *In re Clark, ex parte Beardmore*,

(1894) 2 Q.B., at p. 410.

(m) S. 61, Act of 1890.

(n) *Reg. v. Prendergast*, 4 A.J.R., 79.

(o) S. 62, Act of 1890.

(p) Ss. 32, 61, *ibid.*(q) *Reg. v. Prendergast*, 4 A.J.R., 79.

**CHAP. V.** or incident to property as defined (*r*). Choses in action, and all claims founded on breach of contract, pass to the trustee, and therefore an insolvent's right of action arising before insolvency out of breach of contract vests in the trustee, and this even if he is the person against whom the right of action exists, but claims for personal wrongs or injuries remain in the insolvent (*s*). Choses in action, however, are subject to the same equitable incidents as to priority of notice as an assignment of similar property, as the insolvency is not notice to all the world, and therefore the trustee is postponed to a person who takes an assignment of the debt or claim without notice of the insolvency, and who gives notice to the persons liable before the trustee does (*t*).

Choses in action.

Vesting when trustee appointed under Part IX., Act of 1890.

Where an estate is sequestrated of which a trustee has been appointed under Part IX., Act of 1890, such trustee is appointed by the order or order *nisi* for sequestration instead of an assignee, and the property of the debtor, both present and future, vests in such trustee in the same manner as if he were an assignee appointed under the Act, and such trustee has all the duties, powers, rights and liabilities of a trustee duly confirmed (*u*).

Vesting of joint and separate estates.

The order of sequestration of the estate of a firm vests the joint and separate estates of the partners in the assignee, and the order of the Court confirming the election or appointment of a trustee vests the joint and separate estates in him. Separate trustees for the joint and separate estates cannot be appointed (*v*), and in both compulsory and voluntary sequestrations the sequestration of the joint estate is a sequestration of the separate estate of each partner, and no separate order of sequestration of any one of the separate estates is necessary (*w*); but it may be still debateable as to whether a joint voluntary sequestration by a majority of partners sequestrates also the separate estates of such majority (*x*).

(*r*) S. 4, Act of 1890.

(*s*) *Vail v. Gilmour*, 11 V.L.R., 381; and *vide s. 79*, Act of 1890, and *Merry v. The Queen*, 13 V.L.R., at p. 267.

(*t*) *Palmer v. Locke*, 18 Ch.D., 381, and *vide In re Stone's Will*, (1893) W.N., 50.

(*u*) S. 60, Act of 1890. This section in the Act of 1871 also referred to estates assigned to a trustee or trustees for the benefit of creditors generally, but the words referring to such were

repealed by 35 Vict. No. 411, s. 2, as it was possible for an insolvent to appoint his own trustee. *Vide In re Mackay*, 2 V.R. (1.), at p. 25.

(*v*) *In re Curtain v. Healey*, 5 V.L.R. (1.), 109. *Vide r. 289* (2).

(*w*) *In re Turnbull*, 1 W. & W. (1.), 105.

(*x*) *Bates v. Loewe*, 1 W. & W. (E.), 7; and *vide In re Thomas and Cowie*, 9 V.L.R. (1.), at p. 12, and *In re Turnbull, ante*.

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Where the estate of one member of a partnership is sequestrated, and subsequently the estate of another member of the partnership is sequestrated, the proceedings in the last-mentioned estate are directed to be prosecuted or transferred to the Court of the district in which proceedings under the former are being prosecuted, and unless the Court otherwise directs the same trustee is to be appointed as in the first-mentioned estate, and the Court may give such directions for consolidating the proceedings under the sequestration as it thinks fit (*y*). Cases have arisen in England in which a partnership has been dissolved, and subsequently separate sequestrations of the estates of the partners have occurred. In such the Court has directed a consolidation of the bankruptcies to be administered in the same manner as if a joint adjudication had been obtained. There is reference to consolidation in the *Bankruptcy Act* 1883, s. 112, upon which the Victorian rule cited is based, but it appears that the power to consolidate separate proceedings was not the invention of Statute originally, but that it existed in practice long before it had any statutory form (*z*).

Consolidation of proceedings in estates of partners.

Such estates vested in same trustee.

Separate sequestrations after dissolution.

Consolidation.

The proceedings may be consolidated where there are separate sequestrations of partners after the partnership has been dissolved and there are joint assets and liabilities still in existence (*a*).

When a new assignee or trustee is appointed or elected on the death, resignation or removal of any assignee or trustee, and the same is duly confirmed, the order appointing the new assignee or confirming the election or appointment of the new trustee vests in the new assignee or trustee (as the case may be) the whole of the insolvent estate, and every power, right, title, privilege and remedy vested in or competent to the former assignee or trustee as such assignee or trustee before his death, resignation or removal as fully and to the same extent as the same was vested in the former assignee or trustee by the order appointing him or confirming his election or appointment, and the death, resignation or removal of any assignee or trustee does not affect the validity of any lawful act done by him as assignee or trustee prior to his death, resignation or removal (*b*).

Vesting of estate in new assignee or trustee on the death, resignation or removal of prior assignee or trustee.

Validity of lawful acts by assignee or trustee unaffected by death, resignation or removal.

(*y*) R. 291 (2).

(*z*) *Vide in re Abbott*, (1894) 1 Q.B., at p. 444; *In re Gowar and Dawe*, 1 M.D. & D., 1; *vide also Ex parte and*

*in re Fuller*, 1 Mont. & A., at p. 222.

(*a*) *In re Abbott*, *ante*.

(*b*) S. 63, Act of 1890—compare 5 Vict. No. 17, s. 58.

CHAP. V. 2.—PROPERTY DIVISIBLE AMONGST CREDITORS AND INCIDENTS  
THERETO.

The property of the insolvent divisible amongst his creditors may be sub-divided as follows :—

Class I. (a)—As to Property that may belong to or be vested in the Insolvent at the date of the Order of Sequestration or may be acquired by or devolve on him before he obtains his Certificate.

(b) Conveyances of Property which are acts of Insolvency.

(c) Voluntary and Fraudulent Settlements of Property.

(d) Fraudulent preferences of Property.

Class II.—As to the capacity to exercise and to take proceedings for exercising all such powers over or in respect to Property as might have been exercised by the Insolvent for his own benefit.

Class III.—As to Property the subject of reputed ownership.

Class I. (a).

The assignee or trustee as to property under the *Transfer of Land Act* 1890 (c), is entitled to be registered as proprietor of any land, lease, mortgage or charge vested in the insolvent at sequestration, or of which the insolvent may be registered as proprietor before obtaining his certificate upon his applying in writing under his hand, to the Registrar of Titles to be so registered (d). The application must be accompanied by an office copy of the appointment (e). By the vesting clause (f), the beneficial ownership passes to the assignee, but the legal ownership still remains in the insolvent, and until the application referred to is made by the assignee or trustee, and subject to the operation of any caveat which may be lodged by the assignee or trustee, dealings by the insolvent may be registered and are not affected by the order of sequestration, either at law or in equity (g), but where a caveat has been lodged by the assignee or trustee against any dealing with land forming part of such estate and an application for registration as proprietor is made by him during the existence of such caveat, the Registrar is bound to

Property under  
the *Transfer of  
Land Act* 1890.

(c) This Act, with reference to estates sequestrated under the *Insolvency Act* of 1890, must be construed as if it had been passed after the coming into operation of the Act of 1890 (s. 3, Act of 1890). It was so provided, apparently to aid the transfer of estates in cases where persons who were registered

proprietors became insolvent. *Vide Reg. v. McCooey*, 5 V.L.R. (L.), at p. 42.

(d) *Transfer of Land Act* 1890, s. 236.

(e) *Ibid.*

(f) S. 59, Act of 1890.

(g) *Transfer of Land Act*, ante, s. 237.

ignore all dealings by the insolvent proprietor with land under the operation of the *Transfer of Land Act*, and to register the assignee (*h*). CHAP. V.

As to property under the *Real Property Act* 1890 the order of sequestration or adjudication of sequestration must be registered by the Registrar-General, together with the name of the insolvent, his address and description, and the name of the assignee or trustee (*i*). Property under the *Real Property Act* 1890.

In the event of the insolvency of any lessee or licensee of a grazing area or of an agricultural allotment under the *Land Act* 1884 or the *Land Act* 1890 or of an allotment under the *Land Act* 1869 or any Act amending the same or of any licensee of a grazing allotment under the *Land Act* 1898, the assignee or trustee can, without the consent of the Board of Land and Works, which is required in ordinary cases and without which a transfer has no force or validity either at law or in equity, assign the lease or licence within twelve months from the date of the insolvency to any person qualified to become a lessee or licensee, and such person with respect to such lease or licence then stands in the same position as though he had been the original lessee or licensee (*k*). When the assignee or trustee fails to assign in the manner and within the time specified, the Governor-in-Council may assign or permit the same to be assigned to some person who is qualified (*l*). Grazing areas and agricultural allotments under the *Land Act* 1884 and the *Land Act* 1890 and allotments under *Land Act* 1869 and grazing allotments under *Land Act* 1898.

When either the licence of an agricultural or a grazing allotment is assigned by the assignee or trustee of an insolvent licensee and such licensee has not occupied the allotment pursuant to the conditions of the licence or no proof satisfactory to the Board has been given of such occupation the Governor-in-Council may alter the date of such assigned licence in such a manner as will enable the new licensee to comply with the condition of occupation, and may make such adjustments of rent as are necessary (*m*). The assignee or trustee need not comply with the conditions as to residence (*n*). Date of such licences when assigned by assignee or trustee.

In the case of leases of Mallee allotments the assignee or trustee.

(*h*) *In re Palmateer*, 16 V.L.R., 793.

(*i*) S. 20, Act of 1890; r. 173.

(*k*) *Land Act* 1891, s. 8; *Land Act* 1898, s. 61 (6).

(*l*) *Vide* ss. 47 and 66, *Land Act* 1898.

(*m*) *Ibid*, s. 46 (2); 65.

(*n*) *Ibid*, s. 62.

## CHAP. V.

trustee may transfer at any time within two years after the insolvency, but the consent in writing of the Board of Land and Works is necessary to the assignment, and the person to whom the lease is sought to be assigned must be in the opinion of the Board qualified to become a lessee of a mallee allotment. Upon the assignment being completed the assignee of the lease stands in the same position as though he had been the original lessee (o). The trustee need not comply with the condition of residence (p).

Perpetual  
leaseholds of  
mallee land.

In the case of the insolvency of a perpetual lessee of mallee land under the *Land Act* of 1898, the assignee or trustee may at any time within twelve months from the date of the insolvency assign the lease to any person who is qualified, and such person then occupies the same position as if he had been the original perpetual lessee (q), and where by the said Act power is given to any person to select any land under a perpetual lease the assignee or trustee of the insolvent lessee has the like right to assign within the same period and to the same effect (r).

Perpetual  
leaseholds  
under *Land Act*  
1898 of other  
land.

Property under  
*Settlements on*  
*Land Act* 1893.

In the case of village community allotments under the *Settlement on Lands Act* 1893, the assignee or trustee of the lessee may assign the lease within twelve months from the date of the insolvency to any person who is qualified to become a lessee of the allotment, and the effect is to place the transferee in the same position as though he had been the original lessee (s). In the case of homestead sections and township allotments under this Act the assignee or trustee can deal in the like manner and confer the like title within the like period but subject to the approval of the Board of Land and Works (t).

Property outside  
Victoria.

In the event of the insolvent having real or personal estate outside Victoria, or any interest therein whether in possession reversion or expectancy the Court may upon application of the trustee order the insolvent to execute all necessary deeds instruments and writings and to do all such acts matters and things as may be necessary to enable the trustee to realise or make available the whole or such part thereof or the proceeds thereof as the Court may think proper for distribution amongst the creditors

(o) *Mallee Lands Act* 1896, s. 26.

(p) *Ibid.*

(q) S. 134 (e), *Land Act* 1898.

(r) *Vide* s. 80 (7), *ibid.*

(s) *Settlement on Lands Act* 1893, s. 11.

(t) *Ibid.*, s. 30.

of the said insolvent (*u*). Under s. 24 (2) of the Act 46 and 47 Vict. c. 52, the bankrupt must similarly execute such deeds and in *In re Harris* ([1896], W.N., 33; 3 Manson, 46), the only asset of the bankrupt was some land in Guatemala in South America, and there only the registered owner of property is regarded and it cannot be dealt with except by him or under a registered power of attorney from him. The trustee could sell the asset for £1000, and requested the bankrupt to execute a power of attorney to enable him to complete. The bankrupt refused, objecting to the form of the instrument and to the price, and the trustee applied to the Court for his committal on the ground that the refusal was a contempt. It was held that under the circumstances the refusal of the bankrupt was unreasonable, and an order of committal was made, but not to be enforced if within fourteen days the bankrupt executed a power of attorney approved of by the registrar. Should, however, no application be made, and the insolvent not execute "all the necessary deeds" or die before he does so, the real estate apparently will not vest in the assignee or trustee (*v*). Personal property outside the colony vests in the trustee (*w*), but there may be cases in which in order to acquire the legal ownership some particular form of transfer or assignment is necessary by the law of the country in which it is situated, as for instance, money in the English public funds or a legal chose in action only assignable in pursuance of the provisions of an Act of Parliament in which cases the beneficial interest only passes until the transfer or assignment has been obtained (*x*). The provisions of s. 103, Act of 1890, giving to the Court jurisdiction to compel the insolvent to execute all necessary writings and deeds, and to do all acts matters and things necessary to enable the trustee to realise in respect to personal estate as well as real estate, is intended to meet such cases (*y*). The general distinction it may be added between personal and real estate is that the former is generally governed by the law of the domicile of the owner and transferred by assignment according to that law, the latter by the *lex loci rei sitae* and not so trans-

(*u*) S. 103, Act of 1890—compare s. 24 (2), 46 & 47 Vict. c. 52.

(*v*) *Waite v. Bingley*, 21 Ch. Div., at p. 682.

(*w*) *Vide Sill v. Worswick*, 1 Hy. B. 665, and 2 R.R. 816. *Phillips v. Hunter*,

2 Hy. B., 403, and 2 R.R., 353; *Hunter v. Potts*, 4 T.R., 162, and 2 R.R., 353.

(*x*) Westlake on Private International Law, s. 126.

(*y*) *Vide ex parte Blakes*, 1 Cox, Cas. in Eq., 398.

## CHAP. V.

ferred (z), but where there is a sequestration here as well as in England, as where a bankrupt left England undischarged and coming to Victoria acquired property and contracted debts, and subsequently his estate was sequestered, the English assignee could not recover from the Victorian assignee the property acquired in Victoria (a). Where a person having a vested reversionary interest in a trust fund of personal property in England became insolvent in South Australia, and the property fell into possession, but before it was paid over the insolvent died, it was held to be a question of domicile, if it were Australian the assignees under the insolvency were entitled to payment of the fund, but if it were English the executrix who had proved in England was entitled (b).

Mortgaged property.

As to mortgaged real estate, under the general law the trustee takes subject to registered and unregistered mortgages (c); and where prior to insolvency A. conveyed to B., and subsequently A.'s trustee conveyed to C. though the latter was registered before the conveyance by A., it was held that the conveyance to the trustee was inoperative and acquired no validity by its prior registration (d). The trustee has power to redeem mortgaged property before the date of payment (e). The incumbrancer, if the trustee does not redeem, can rest on his securities, and besides his other rights may apply for the taking of accounts by order of Court and for the sale of the property as provided by rr. 88 to 92, Appendix, *post*.

Court may order sale of property under equitable charge.

If any debt or sum of money due to any insolvent be charged upon any land by way of equitable mortgage the trustee may apply to the Court, upon notice to all parties interested, for an order for the sale of the lands comprised in such equitable mortgage, and the Court may make such order (f). Any mortgagee, with the leave of the Court first obtained, may bid at any sale of the mortgaged property (g). Where under a settlement or will an insolvent is entitled to a life estate in remainder expectant upon the death or deaths of any previous tenant or tenants for life with any remainder over to the insolvent's issue or to the

Power of mortgagee to bid at sale.

Life estate in remainder not to be sold except by order of the Court.

(z) *Cockerell v. Dickens*, 1 Mont., D. & D., at p. 77.

(a) *In re Walters, ex parte Shaw*, "Argus," April 27th, 1860.

(b) *In re Blithman*, L.R., 2, Eq., 23; vide also *In re Davidson's Settlement Trusts*, L.R., 15, Eq., 383.

(c) *Fraser v. Australian Trust Company*, 3 A.J.R., 1 and 83.

(d) *Andrews v. Taylor*, 6 W.W. & A'B. (L.), 223.

(e) S. 93, Act of 1890.

(f) S. 101, Act of 1890.

(g) S. 94, *ibid*; r. 88.



heirs of his body or any of them as purchasers, the life estate of such insolvent cannot be sold before it falls into possession without an express order of the Court (*h*). CHAP. V.

The trustee can deal with any property to which the insolvent is beneficially entitled as tenant in tail in the same manner as the insolvent might have dealt with the same, and Part VIII. of the *Real Property Act* 1890 extends and applies the proceedings in insolvency under the *Insolvency Acts* as if the said part were re-enacted therein and made applicable in terms to such proceedings (*i*). Estates tail.

Where any portion of the property of the insolvent consists of stock, shares in ships, shares or any other property transferable in the books of any company, office or person, the right to transfer such property is absolutely vested in the trustee to the same extent as the insolvent might have exercised the same if he had not become insolvent (*k*). Though by this section the right to transfer shares in ships is declared to be absolutely vested in the trustee, the Imperial Statute, 17 & 18 Vict. c. 104, is in force in the colony, and consequently (*l*) the transmission of the property in any ship or in any share therein which becomes transmitted by the bankruptcy or insolvency of any registered owner must be authenticated by a declaration of the person to whom such property has been transmitted, made in the form marked "H" in the schedule thereto, accompanied by a statement describing the manner in which and the party to whom such property has been transmitted. Such declaration must be made and subscribed if the declarant resides at or within five miles of the Custom House of the port of registry in the presence of the registrar but if beyond that distance in the presence of any registrar, or of any justice of the peace. The declaration (*m*) must be accompanied by evidence of proof of title under the insolvency. The registrar, upon receipt of such declaration so accompanied as aforesaid, enters the name of the person or persons so entitled under such transmission in the register book as owner or owners of the ship or share therein (*n*). The port Property represented by shares.

(h) S. 95, Act of 1890.

(i) S. 85 (4), Act of 1890; s. 1, Act of 1897.

(k) S. 81, Act of 1890—compare 32 &

33 Vict. c. 71, s. 22.

(l) 17 & 18 Vict. c. 104, s. 58.

(m) *Ibid.*, s. 59.

(n) *Ibid.*, s. 60.

**CHAP. V.** or place at which any British ship is registered for the time being is considered her port of registry or the port to which she belongs (o).

Onerous  
property.  
Disclaimer.

Where the shares are in companies and unmarketable the trustee, notwithstanding he has endeavoured to sell or has taken possession or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim them, and the shares are deemed to be forfeited from the date of the order of sequestration (p), and if any part of the insolvent estate consists of land of any tenure burdened with onerous covenants, of unprofitable contracts, or of any other property that is unsaleable or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the trustee notwithstanding he has endeavoured to sell or has taken possession of such property or exercised any act of ownership in relation thereto may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer, the property disclaimed, if the same is a contract, is deemed to be determined from the date of the order of sequestration, and if the same is a lease is deemed to have been surrendered on the same date, and if any other species of property it reverts to the person entitled on the determination of the estate or interest of the insolvent, but if there is no person in existence so entitled then in no case does any estate or interest therein remain in the insolvent (q).

Signature to  
disclaimer.

Any person  
interested may  
apply to the  
Court.

Person injured  
may prove.

Bar to  
disclaimer.

The disclaimer should be signed by the trustee, and it is invalid if signed by the trustee's solicitor (r). Any person interested in any disclaimed property may apply to the Court, and the Court may, upon such application, order possession of the disclaimed property to be delivered up to him or make such other order as to the possession thereof, as may be just (s). Any person injured by the operation of this provision (t) is deemed a creditor of the insolvent to the extent of such injury and may accordingly prove the same as a debt under the insolvency (u). The trustee is

(o) *Ibid*, s. 33.

(p) S. 84, Act of 1890.

(q) S. 84, Act of 1890—compare 32 & 33 Vict. c. 71, s. 23; 5 Vict. No. 17, ss. 84, 85; 28 Vict. No. 273, ss. 76, 77.

(r) *Wilson v. Wallani*, 5 Ex. Div., 155.

(s) S. 84, *ante*.

(t) *Ibid*.

(u) *Ibid*. For instances of proof vide *Ex parte Llynvi Coal Co., re Hyde*, L.R. 7, Ch. 28; *Ex parte Blake, re McEwan*, 11 C.D., 572; *Re Hallett, ex parte National, &c., Insurance Co.*, 1 Manson

not entitled to disclaim any property in pursuance of the Act in cases where an application in writing has been made to him by any person interested in such property requiring him to decide whether he will disclaim or not, and he has for a period of not less than twenty-eight days after the receipt of such application, or of such further time as may be allowed by the Court, declined or neglected to give notice whether he disclaims the same or not (*v*).

The application to extend the time must be made within the twenty-eight days in the absence of excusable circumstances (*w*). The trustee should give some good reason to the Court, and if the rights of other parties will be prejudiced the Court may put the trustee on terms (*x*).

Extension of time.

The property vests in the assignee or trustee immediately upon the making of the order for sequestration and remains with him until disclaimed, and he is liable to the landlord for rent of premises from the time of sequestration to the time of disclaimer, and where he has entered upon the premises to make an inventory of the goods of the insolvent and has kept the goods there for some time before selling them he is, in the absence of sufficient assets in the insolvent's estate, personally liable for the rent until he gives up possession to the landlord (*y*), but he is not personally liable in respect to the period between the time when his actual occupation ceases and the date when the disclaimer is executed (*z*). The right to prove under s. 117, Act of 1890, for the proportionate part of the rent up to the date of sequestration does not relieve the trustee from personal liability (*a*). The section only applies where there is a disclaimer (*b*), but where the trustee has taken actual possession of the leasehold and receives a notice from the landlord to disclaim the lease and does not, he may

Liability of trustee as to non-disclaimed property.

380; *Re Carruthers, ex parte Tobit*, 2 *Manson*, 172; *Ex parte Corbett, re Shand*, 14 C.D., 122.

(*v*) S. 84, *ante*.

(*w*) *Ex parte Lovering, re Jones*, L.R. 9, Ch. 586; *Re Richardson, ex parte Harris*, 16 C.D., 613; and *vide Re Baker, ex parte Official Receiver*, 8 *Morrell*, 116.

(*z*) *In re Price, ex parte Foreman*, 13 Q.B.D., 466; *Re Page, ex parte Mackay*, 14 Q.B.D., 401.

(*y*) *Brasher v. Davey*, 12 V.L.R., 343.

*Vide Ex parte Wilson v. Wallani*, 5 Ex. D., 155; *Ex parte Dressler, in re Solomon*, 9 Ch. D., 252; *Titterton v. Cooper*, 9 Q.B.D., 473.

(*z*) *Lowrey v. Barker*, 5 Ex. D., 170; *sed vide Brasher v. Davey, ante*.

(*a*) *Ex parte Dressler, in re Solomon, ante*.

(*b*) *Vide judgment of Mellish, J., in Ex parte Llynvi Coal and Iron Company, in re Hide*, L.R. 7 Ch., 28; *Ex parte Davis, in re Sneezum*, 3 C.D., at p. 475.

## CHAP. V.

nevertheless relieve himself of liability to the landlord by assigning the lease even without having previously offered to surrender it, and the fact that the trustee knows the assignee to be a pauper will not invalidate the assignment (c); and the trustee who sells leasehold property of the insolvent subject to a covenant not to assign without consent and does not obtain the necessary consent is not personally liable under the covenant, though it extends to assigns by operation of law (d). The liability of the trustee is based on privity of estate, and the moment he gets rid of his estate his liability ceases (e); and if the trustee neglects to disclaim a continuing contract he is not put in the position of having adopted it either personally or on behalf of the estate, the other party's remedy being, if the trustee ceases to perform it, to prove for damages for breach (f).

## Disclaimable property.

The right of disclaimer is not limited to property of the insolvent divisible amongst his creditors, but extends to any property as defined by s. 4, Act of 1890 (g).

## Effect of disclaimer on leases.

The effect of the disclaimer on a lease is to put an end to it, not merely to the term, but to the lease itself. On the one hand, therefore, it deprives the landlord of the future benefit of all those clauses of the lease which give him a benefit, and on the other hand it deprives the tenant of the future benefit of all those clauses of the lease which give him a benefit (h).

## Disclaimer of expired lease.

The trustee may disclaim a lease even though it has been determined by effluxion of time or by forfeiture between the appointment of trustee and the execution of the disclaimer, but if he does so the effect of the disclaimer when executed is that neither the lessor nor the trustee can claim the benefit of any provisions contained in the lease which were to come into operation at the expiration or sooner determination of the term (i).

(c) *Hopkinson v. Lovering*, 11 Q.B.D., 92. As to a trustee under a deed of assignment, *vide Stevenson v. Brind*, 16 A.L.T., 166.

(d) *In re Johnson, ex parte Blackett*, 1 Manson, 54.

(e) *Ibid.*

(f) *Re Sneezum, ex parte Davis*, 3 C.D., 463.

(g) *Vide in re Maughan, ex parte Monkhouse*, 14 Q.B.D., 956.

(h) *Ex parte Dyke, in re Morrish*, 22 Ch. D., at p. 425, referring to *Ex parte Glegg, re Latham*, 19 C.D., 7, and *Ex parte Allen, re Fussell*, 20 C.D., 341.

(i) *Vide Ex parte Dyke, re Morrish*, 22 C.D., 410.

With respect to leases under the *Transfer of Land Act 1890* subject to mortgage, upon the insolvency of the proprietor of any lease made under that Act subject to one mortgage only or to several mortgages if owned by the one person, the mortgagee may apply to the registrar by writing, if the assignee or trustee refuse to accept such lease accompanied by a statement to that effect signed by the assignee, to have an entry of such refusal noted in the Register Book. Such entry operates as a foreclosure and as a transfer of the interest of the insolvent in such lease to the mortgagee or his transferees (*j*). CHAP. V.  
Foreclosure of  
leases under  
*Transfer of Land*  
Act when  
disclaimed.

Freehold property "burdened with onerous covenants" within the meaning of the section, can be disclaimed (*k*). The legal estate, though the title deeds are deposited with an equitable mortgagee, remains outstanding and does not revert in the insolvent and the freehold apparently reverts to the Crown (*l*). As to disclaimer  
of freeholds.

The rights and liabilities of other parties in relation to the property disclaimed are not affected by the disclaimer by the trustee, the object of the provision being to relieve the estate and the trustee and insolvent from liability (*m*), and the Court in determining whether leave to disclaim should be given should not have regard to any injury which the disclaimer might occasion to third parties (*n*). Effect of  
disclaimer on  
third persons.

After acquired property passes to the assignee or trustee by ss. 59, 70 (3), Act of 1890, subject generally to the rule that until the trustee intervenes dealings by the insolvent with other persons in reference to after acquired property are valid as against the trustee, whether with or without knowledge of the insolvency if the persons dealt with have acted in good faith, though the question of whether the insolvent, as between himself and the creditors, acts in good faith is immaterial (*o*). If an insolvent, before he obtains his certificate, becomes seised, possessed or entitled of or to any property, the trustee, if directed After acquired  
property.

(*j*) S. 105 *Transfer of Land Act 1890*. Vide this section also as to surrender of the lease to lessor if the mortgagee neglects to make the application.

(*k*) *In re Mercer and Moore*, 14 C.D., 287.

(*l*) *Ibid.*

(*m*) *Ex parte Walton*, *In re Levy*, 17

C.D., 746. Vide also *Ex parte Gessner*, *in re Kirk*, 1 W. & W. (1), 183; *Smyth v. North*, L.R. 7, Ex. 242; *Harding v. Preece*, 9 Q.B.D., 281; *Smalley v. Hardinge*, 7 Q.B.D., 524.

(*n*) *Ex parte East and West India Dock Co., re Clarke*, 17 C.D., 759.

(*o*) *Cohen v. Mitchell*, 25 Q.B.D., 282.

**CHAP. V.**  
**Duty of trustee.**

**Rights of subsequent creditors.**

**As to insolvent.**

**How after-acquired property passes.**

by resolution of a general meeting of creditors or by the committee of inspection, must apply to the Court upon notice to the insolvent and such other persons (if any) as the Court may direct for an order directing that such property be dealt with under the Act and applied in payment of the creditors, and the Court may make such order thereon, but the Court in so doing has such regard to the rights of creditors of the insolvent whose debts may have been incurred since the sequestration as it may deem just (*p*). It was intimated by *In re Mulcahy*, 5 V.L.R. (I.), 7, 12, that if an insolvent becomes entitled to property which is in the hands of a third party claiming adversely to the insolvent it is the duty of the assignee to get possession of it without regard to s. 150, but before applying it the trustee should apply under such section. Persons who deal with an insolvent fairly and honestly after his insolvency in a calling which he is carrying on with the knowledge of his trustee and creditors have a right to be paid in priority to the creditors under the insolvency (*q*); and therefore where an uncertificated insolvent carried on his practice as a solicitor after insolvency with the knowledge of his trustee and acquired property and incurred new debts the subsequent creditors were entitled to be satisfied out of the property in priority to the previous creditors (*r*). As against the insolvent the trustee as to the insolvent's possession is always entitled to the after-acquired property, yet in the case of a sale of a business with the consent of the creditors to an undischarged bankrupt, upon payment of the purchase money for which he is to be entitled to his discharge, the after-acquired profits belong to him (*s*). After-acquired property passes in precisely the same way under the English Act as under the Victorian (*t*), and therefore where an undischarged bankrupt enters into transactions in respect of property acquired after the bankruptcy, then until the trustee

(*p*) S. 150, Act of 1890. The term "rights of creditors" is limited to rights *in rem* and does not include rights *in personam*; *In re Warne, ex parte Young*, 11 V.L.R., 320.

(*q*) *Shaw v. Hyett*, 17 V.L.R., at p. 615. In the judgment in this case it is stated that a long string of cases commencing with *Troughton v. Gilley* (Ambler, 630), and continuing down to *Engelbach v. Nizon* (L.R. 10 C.P., 645), appear to establish the proposition. It is necessary in order for the trustee to be estopped in the manner indicated

that he should have had knowledge of the dealings, as he did in the case cited, and abstain from intervening. *Vide Ex parte Ford, re Caughey*, 1 C.D., 521.

(*r*) *Shaw v. Hyett, ante*.

(*s*) *Ex parte Caughey*, 4 C.D., 533; and *vide Ex parte Tinker, re France*, L.R. 9 Ch., 716.

(*t*) *Shaw v. Hyett*, at p. 616, comparing *Herbert v. Sayer*, 5 Q.B.D., 965, and *Cohen v. Mitchell*, 25 Q.B.D., 262, with *Sartori v. Laby*, 9 V.L.R. (L.), 329; and *vide Hunt v. Fripp*, (1898) 1 Ch., 675; 5 *Manson*, 105.

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intervenes all such transactions, as previously pointed out, with any person dealing with the bankrupt *bond fide* and for value and whether with or without knowledge of the bankruptcy are valid against the trustee (u), and this principle may apply though the property is in the hands of a third party and has not reached the insolvent's hands, at the time of the intervention (v); but money received by an uncertificated insolvent and paid away for value to a person with knowledge of the insolvency cannot be followed by the trustee (w). The principle laid down in *Cohen v. Mitchell* also applies to chattel interests in land, consequently a mortgagee in possession of leaseholds acquired by the mortgagor after bankruptcy can sell them if the trustee has not intervened (x), and where an undischarged bankrupt assigns an equitable chose in action, such being a share of residuary estate which has accrued to him after bankruptcy, the assignment is valid as against the trustee if made *bond fide* by the person dealing with the bankrupt, and it may be held to be *bond fide* although the person dealing with the bankrupt knew of the bankruptcy and knew that the trustee was not aware of the accruer of the property (y). An uncertificated insolvent received an advance of money from a person to enable him to purchase a leasehold property under the *Transfer of Land Act 1890*. The advance was made without security and without notice of the insolvency, but the insolvent promised to repay the amount as soon as the transfer should be completed by means of a loan to be raised on the security of the land. After the insolvent was registered as proprietor and before he had repaid the money to his subsequent creditor the assignee interfered. It was held that the subsequent creditor had no legal or equitable right enforceable against the insolvent's estate and he had no right to be paid in priority to or even rateably with the creditors prior to the sequestration (z). By s. 237 of the Act referred to dealings by an insolvent proprietor may be registered and thereupon they are not affected by the order of sequestration either at law or in equity. Intervention, therefore, in regard to such property is necessary. As to real estate under the general law, the trustee's title is not affected by his non-intervention, and an

Intervention of trustee.

Money.

As to chattel interests in land. Equitable chose in action.

As to land under Transfer of Land Act 1890.

As to real estate under general law.

(u) *Cohen v. Mitchell*, ante.(v) *Hunt v. Fripp*, ante.(w) *Ex parte Dewhurst, re Vanloke*, L.R. 7 Ch., 185.(z) *In re Clayton and Beaumont's con-*

tract, 2 Manson, 345.

(y) *Hunt v. Fripp*, ante.(z) *In re Warne, ex parte Young*, 11 V.L.R., 320.

CHAP. V. uncertificated insolvent cannot, therefore, give a good title to such property to a *bond fide* purchaser as against the trustee, whether the latter has intervened or not (a).

After-acquired property where a second adjudication occurs.

Where the respective rights of the trustees under a first and second bankruptcy of an undischarged bankrupt were in question the property acquired by the bankrupt by trading between the first and second adjudications was directed to be distributed as assets in the first bankruptcy (b), but, apparently, if the business had been carried on with the knowledge and consent of the trustee the result would have been different (c). In cases where the trustee can and has intervened neither the insolvent nor third persons dealing with him can claim an indemnity (d). If the trustee gives his sanction to the debtor the latter becomes his agent and has a right to an indemnity (e).

As to indemnity of insolvent and third parties.

Effect of sequestration on assignment of after acquired property.

A debtor can give a good title to after acquired property by assignment if the property can be ascertained, and therefore free from the objection of vagueness, as an assignment for valuable consideration of all moneys under a will (f), and an assignment of future book debts, though not limited to book debts in any particular business will pass the equitable interest in book debts incurred after the assignment whether in the business carried on by the mortgagor at the time of the assignment, or in any other business, and the trustee in insolvency cannot recover from the mortgagee, for money had and received, as after-acquired property, debts incurred before, but paid to him after the bankruptcy (g). Registration of the assignment is required by the *Book Debts Act* 1896. The assignment of the future receipts of a business though made for value is however inoperative against the trustee as regards the receipts accruing after the sequestration (h). Similarly so is the equitable assignment of future payments under a contract as to such payments as may become due after sequestration (i), and an assignment in a bill of sale of future acquired chattels though

(a) *In re New Land Development Association and Gray*, (1892) 2 Ch. 138. *Vide* also judgment in *In re Clayton's and Beaumont's contract*, *ante*.

(b) *In re Clark, ex parte Beardmore*, (1894) 2 Q. B., 393, following *Ex parte Ford*, in *re Caughey*, 1 C.D., 521; and explaining and distinguishing *Cohen v. Mitchell*, *ante*.

(c) *Ibid*, at p. 404.

(d) *Re Clark, ex parte Kearley*, 6 Morrell, 42.

(e) *Ibid*.

(f) *In re Clarke, Coombe v. Carter*, 36 C.D., 348 and 352.

(g) *Tailby v. The Official Receiver*, 13 App. Cas., 523.

(h) *Ex parte Nichols, in re Jones*, 22 C.D., 782.

(i) *Wilmut v. Alton* (1897), 1 Q.B., 17.



absolute in form is merely a contract to assign and is ineffectual against the trustee as to chattels acquired after sequestration (k). CHAP. V.

An uncertificated insolvent can sue and maintain an action on a contract for services rendered after sequestration where the trustee does not interfere, as in respect to the same he is the agent of the trustee and contracts for his benefit. The rule applies to him, as in other cases of principal and agent, he may sue without naming his principal unless the principal interferes. It does not in such a case lie with him who has made the contract to set up the rights of a third person (l), and following this principle an uncertificated insolvent who holds a miner's right may maintain a complaint before a warden for trespass on a residence area and his trustee is not a necessary party to such proceeding (m). Causes of action accruing after sequestration.

S. 75, Act of 1890, taken literally is inconsistent with the insolvent acquiring property. The section runs:—"All warrants of attorney and cognovits actionem alienations, transfers, gifts, surrenders deliveries, bills of sale, mortgages or pledges of any property made by an insolvent after sequestration and before he shall have obtained his certificate shall be and are hereby declared to be fraudulent and absolutely void." On the construction of this section it has been held to mean that the transactions referred to are void "as against the assignee or trustee" (n). The 71st, 72nd and 73rd sections, it was explained, all relate to transactions prior to sequestration, while the 75th relates to subsequent alienations. "As against the assignee or trustee" is as much as to say "in the event of sequestration." The transactions impeached by the first mentioned three sections are only avoided in that event, and in that event the property, the subject of the transaction is vested by s. 59, Act of 1890, in the assignee and subsequently in the trustees on their election. In s. 75 there was no necessity to add "in the event of sequestration," for it supposed the order of sequestration to have been already made (o). Insolvent dealing with property after sequestration.

Debts due to the insolvent pass to the trustee (p).

Debts.

(k) *Vide Collyer v. Isaacs*, 19 C.D., 342.

(l) *Madden v. Hetherington*, 3 V.R. (L.), 68.

(m) *Fancy v. North Hurdfield United*

*Co.*, 8 V.L.R. (M.), 5.

(n) *Sartori v. Laby*, 9 V.L.R. (L.), 329.

(o) *Ibid.*

(p) Ss. 4 and 70, Act of 1890.

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Choses in action  
and claims on  
breach of  
contract.

Choses in action with the exception of those referred to in Part 3 of this division of this chapter, *post*, and all claims founded on breach of contract pass to the trustee (*q*), but with equitable choses in action, the trustee must in order to gain priority over other assignees, and to complete his title give notice of the insolvency to the legal holder of the fund (*r*).

Loans by wife  
to husband.

Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise are treated as assets of her husband's estate in case of his insolvency (*s*). The wife can prove however as a creditor for the amount or value of such money or other estate (*t*). If the money or other estate is not entrusted to the husband for the purposes of trade or business the section does not apply (*u*). Neither a gift of any property by a husband to his wife remaining in the reputed ownership of the husband, nor any deposit or other investment of moneys made by or in the name of the wife in fraud of his creditors has by the *Married Women's Property Act* 1890 any validity against the husband's creditors (*v*).

Goods on time  
payment.

The property in goods hired on time payment does not pass to the hirer until the full purchase money is paid. The hirer however has an interest in the goods when they have been hired for a term which the sheriff might sell under an execution (*w*). Such an interest would accordingly pass to the trustee.

Books of  
insolvent not  
subject to lien.

The trustee is entitled to the books of the insolvent, and no person as against the trustee can withhold possession of the books of account or any papers or documents relating to the accounts of the insolvent or to claim any lien thereon (*x*). If there is reason to believe that the insolvent has been guilty of fraud or concealment of property or has absconded, a judge of the Court may order that for a period of three months from the

Right of trustee  
to post letters.

(*q*) *Vide Vail v. Gilmour*, 11 V.L.R., at p. 384.

(*r*) *Vide Stuart v. Cockerell*, L.R. 15 Eq., 607; *Re Russell's Trusts*, L.R. 15 Eq., 26; *Palmer v. Locke*, 18 C.D., 381; *Johnstone v. Coz*, 16 C.D., 571.

(*s*) *Married Women's Property Act* 1890, s. 6.

(*t*) *Ibid.*

(*u*) *Mackintosh v. Pogose*, 2 Manson, 27, following *ex parte Tidswell*, 56 L.J. Q.B., 548. A contrary opinion was expressed in *Alexander v. Barn-*

*hill*, 21 L.R., Ir., 511.

(*v*) *Married Women's Property Act* 1890, s. 13. *Vide also Bernicko v. Walker*, 19 A.L.T., 88; 3 A.L.R., 242; and as to savings made by a wife out of a weekly allowance made her by her husband. *Derlon v. Roberts*, 11 A.L.T., 168; *Smith v. Smith*, 3 V.L.R. (E.), 2.

(*w*) *Dean v. Whittaker*, 1 C. & P., 347; *vide also Wylie v. Nisbet*, 21 V.L.R., 7; 17 A.L.T., 13.

(*x*) S. 98, Act of 1890; r. 453.

date of the order of sequestration all post letters directed or addressed to an insolvent be re-directed, re-addressed, sent or delivered by the Postmaster-General or the officers acting under him to the judge by whom such order is made; and upon notice by transmission of an office copy of any such order to the Postmaster-General or the officers acting under him of the making of such order the Postmaster-General or such officers as aforesaid in Victoria may re-address, re-direct, send or deliver all such post letters to the said judge, who may deal with the same as he thinks proper; and a judge may upon any application to be made for that purpose renew any such order for a like or for any other less period as often as may be necessary (*y*). The order is in form 120, Appendix, *post*.

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Form of order.

On the insolvency of a licensed vendor of stamps it is lawful for the Minister or any distributor of stamps duly authorised to allow to the trustee the value of the stamps, stamped vellum, parchment or paper in the possession of the insolvent at the time of his insolvency, less the amount of percentage allowed by law on the purchase by the insolvent (*z*). The trustee must bring in the stamps, stamped vellum, parchment or paper within three calendar months after the insolvency, and must prove to the satisfaction of the person stated, as the case may be, (1) that the same were actually in the possession of the insolvent, and (2) that such property was purchased or procured by the licensed person from some such distributor of stamps or persons licensed to deal in stamps (*a*).

Stamps and stamped paper.

*Class I. (b).*

*Conveyances, &c., of Property which are Acts of Insolvency.*

Every conveyance, assignment, gift, delivery or transfer of any property which would under the Acts be deemed to be an act of insolvency is absolutely void against the assignee or trustee, but in the case of a conveyance or assignment of all the debtor's property for the benefit of all his creditors all dealings with such property and all acts and things *bond fide* made or done by the trustee of such conveyance or assignment are valid and not

Conveyances and assignments &c. which are acts of insolvency void against trustee. Assignments for benefit of creditors protected.

(*y*) S. 104, Act of 1890.

(*z*) *Stamps Act* 1890, s. 22.

(*a*) *Ibid.*

**CHAP. V.** affected by the sequestration unless the trustee had before or at the time of any such dealings, acts or things, notice that proceedings had been, or were about to be taken, to sequester the estate of the debtor (*b*).  
 Notice.

Transactions pertaining to this class of property are dealt with in Chapter IV., *ante*, under "Acts of insolvency" (Acts 1 and 2), and also in this Chapter, *post*, "Fraudulent Preferences."

*Class I. (c).*

*Voluntary and Fraudulent Settlements of Property.*

Voluntary settlements.

Any settlement of property (*c*) not being a settlement made before and in consideration of marriage or *bond fide* in pursuance of an ante-nuptial contract, or made in favor of a purchaser or incumbrancer in good faith and for valuable consideration or a settlement made on or for the wife or children of the settlor of property, which has accrued to the settlor after marriage in right of his wife, is, if the settlor becomes insolvent within two years after the date of such settlement, void as against the assignee or trustee, and is, if the settlor becomes insolvent at any subsequent time within five years after the date of such settlement, unless the parties claiming under such settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement, void against the assignee or trustee. Any covenant or contract made in consideration of marriage, for the future settlement upon or for his wife or children, of any money or property wherein he had not, at the date of his marriage, any estate or interest, whether vested or contingent in possession or remainder and not being money or property of or in right of his wife, is, upon his becoming insolvent before such property or money has been actually transferred or paid pursuant to such

(*b*) S. 71, Act of 1890; s. 1, Act of 1897. An assignment to trustees for the benefit of creditors may cease to be an available act of insolvency owing to the expiration of six months from its execution and yet not cease to be an assignment specified in this section. Such a deed is included in the section without reservation, and is, therefore, void against the assignee or trustee. *Per Noel, J., In re Finney*, 1 A.L.T.,

187; *sed vide Ex parte Games, in re Bamford*, 12 Ch. D., 314.

(*c*) As to meaning of property see s. 4, Act of 1890. Damages recovered under s. 94, *Marriage Act* 1890, are entirely under the control of the Supreme Court, and a settlement of such is not a settlement of property within the meaning of the term as used above; *vide In re Stephenson, ex parte Brown*, (1897) 1 Q.B., 638; 4 Manson, 13.

contract or covenant, void against his assignee or trustee appointed under the Acts. "Settlement," for the purposes of the section, includes any conveyance or transfer of property (d). CHAP. V.

This provision deals with voluntary settlements which become void against the assignee or trustee in the event of the settlor becoming insolvent—*Firstly, within two years of the date of the settlement; secondly within five years of the date of the settlement; and it also deals thirdly, with covenants or contracts made in consideration of marriage for the future settlement of any money or property as set out in the section.* Classes of settlements void.

*Firstly.*—As to the settlements first referred to the enactment is without proviso, and though the settlement be perfectly fair and honest and in no sense a fraud upon anybody, and though the settlor be perfectly honest and the settlee has given a meritorious but not a valuable consideration, insolvency of the settlor ensuing within two years of the date of the settlement renders it void against the assignee or trustee (e). A person held property in trust under a dummying agreement, illegal within the meaning of sec. 43 of the *Land Act* 1890, and the trust being void, the property became his own, and having transferred it away within the prohibited time of his insolvency for a fictitious consideration, the transfer was held void (f). The proceeds of any property comprised in a voided settlement can be followed so long as they can be earmarked (g). A deed of assignment for the benefit of creditors is not within the section nor of the meaning of the word "settlement" as used in the section (h), and it has been held that a gift of money to a son to enable him to commence business on his own account is not a settlement of property within the meaning of the section (i), the gift being of money to be expended at once takes it out of the section (k). The application of the section depends upon the intention of the "donor" at all events to this extent, that the section does not apply to cases where the circumstances of the gift made it manifest, that the subject matter of the gift was not intended to be preserved by the "donee" as Settlements within two years of sequestration.

(d) S. 72, Act of 1890; s. 1, Act of 1897—compare 32 & 33 Vict. c. 71, s. 91; 5 Vict. No. 17, s. 7; 28 Vict. No. 273, ss. 29, 30.

(e) *Cohen v. Lintz*, 10 V.L.R. (E.), 149.

(f) *Davidson v. Exell*, 19 V.L.R.,

294.

(g) *Halfey v. Tait*, 1 V.L.R. (E.), 8.

(h) *Davey v. Danby*, 13 V.L.R., 957.

(i) *In re Player, ex parte Harvey*, 15 Q.B.D., 682.

(k) *Per Cave, J.*, *ibid.*

**CHAP. V.** would be clear in the case of a gift of money to a son to advance him in business or to a son for his maintenance, on the other hand where the purpose of the transaction is the preservation of the thing for the enjoyment of another person the end and purpose of it must be a settlement that is a disposition of property to be held for the enjoyment of some other person (*l*), and therefore a gift of diamonds given by a bankrupt to his wife within two years of his bankruptcy is within the section and void as it must be taken that the settlor contemplated the retention by the settlee of the gift settled (*m*). Where the settlor reserved the equity of mortgaged land to his wife, the land having been purchased with moneys said to be hers, but which in fact were derived from boarders, from savings out of the weekly money for house expenses allowed to her by the husband, and from moneys handed to her by relatives, those in the latter case being trivial and indistinctly proved, the transaction was held to be voluntary and void under this section, the moneys referred to not being regarded as the wife's "separate estate" (*n*).

Settlements  
within five years  
of sequestration.

*Secondly.*—Settlements become void against the assignee or trustee if the settlor becomes insolvent within five years after the date of the settlement *unless the parties claiming under such settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement.* In this instance a heavy burden is cast upon the persons interested under the settlement to show that the settlor was at the date of its execution able to pay his debts without recourse to the settled property (*o*). It is essential that the settlor should be able to pay his debts in the way he is proposing to pay them, *i.e.*, in the ordinary course of his business if he is proposing to continue it (*p*). The value of the implements of the settlor's trade and of the good-will of his business is not, if he intended to continue his business, to be taken into account, and apparently it is otherwise if he is retiring from the business (*p*).

Meaning of  
"void."

The word "void" has been held to mean "voidable," and

(*l*) *In re Vansittart, ex parte Brown*, (1893) 1 Q.B., 181.

(*m*) *Ibid.*

(*n*) *Smith v. Smith*, 3 V.L.R. (E.), 2.

(*o*) *Ex parte Russell, in re Butler-*

*worth*, 19 Ch. Div., at p. 599; *vide also Ex parte Huztable, re Connibee*, 2 C.D., 54; *Re Loundes*, 18 Q.B.D., 677.

(*p*) *Ex parte Russell, ante*, p. 601.

consequently anyone who claims under a settlement affected by this section as a purchaser for valuable consideration without notice has a good title as against the trustee (q). As between parties it was held where the husband, who subsequently became insolvent, assigned to his wife property by an assignment which was subsequently held void, that the legal effect of the declaration that the deed was void was to avoid it altogether and to place the husband and wife as regarded the insolvency of the former as from the date of the deed and in respect of the property mentioned in it in the same position as if the deed had never been executed (r), and that acts done *bond fide* by a party and in intended performance of a contract on an executory consideration are not necessarily avoided by the subsequent setting aside or rescission of the contract (s).

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Title of *bond fide* purchaser without notice.

When the settlement has been set aside as "void as against the trustee" he cannot stand in the place of the beneficiaries under the avoided settlement, nor has he on behalf of the unsecured creditors any priority over mortgagees and incumbrancers subsequent to the settlement (t). Neither can the trustee defeat a prior title to the settled property, such as the paramount jurisdiction of the Court in lunacy, where the settlor has between the dates of the settlement and the adjudication been found lunatic (u). Though the section does not include any proviso for the protection of a purchaser in good faith and valuable consideration from a beneficiary under the settlement, it is only intended to bind those who claim under the settlement, and does not bind those who have purchased in good faith and for valuable consideration from such donees (v). The section belongs to a class of legislation in favour of creditors, and so far as the earlier English Bankruptcy Acts are concerned it has been held that where valuable consideration has been given subsequent to the date of the settlement, such consideration enures to prevent the transaction being considered a voluntary settlement so as injuriously to affect the position of persons who have given valuable consideration (w).

(q) *In re Brall, ex parte Norton*, (1893) 2 Q.B., p. 381. *In re Carter and Kenderdine's contract*, 4 Manson, 34.

(r) *In re Orr*, 15 V.L.R., 590.

(s) *Ibid.*

(t) *Sanguinetti v. Stuckey's Banking*

*Co.*, (1895) 1 Ch., 176; *vide also In re Cross, ex parte Payne*, 11 C.D., 539.

(u) *In re Farnham*, (1895) 2 Ch., 799.

(v) *In re Vansittart, ex parte Brown*, (1893) 2 Q.B., 377.

(w) *Ibid.*

**CHAP. V.** Settlements of the kind do not come within the definition of "acts of insolvency," and to do so they must either be as well fraudulent preferences within the statutory period or have the character of transactions under s. 37, sub-s. (ii.), Act of 1890.

The excepted transactions.

As to those made in consideration of marriage.

The settlements specifically exempted from the operation of the section are—(1) Those made before and in consideration of marriage. (2) Those made *bond fide* in pursuance of an antenuptial contract. (3) Those made in favour of a purchaser or incumbrancer in good faith and for valuable consideration. (4) Those made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in the right of his wife. As to the exception of settlements made before and in consideration of marriage, the same applies only to a settlement of property of which the settlor is then possessed, or of some estate or interest of the settlor, present or future, vested or contingent, in property then existing, and does not apply to a settlement by anticipation of property which may or may not come into existence at some future time (x). And where the settlement in consideration of marriage contained a covenant by the settlor (the husband) that if at any time while any chattels should remain subject to the settlement any chattels belonging to him of a kind similar to those intended to be settled should be brought into, upon or about the premises or any other premises in or to which the chattels then remaining subject to the settlement should be and be used in or upon the premises with the settled chattels or any of them, then so often as the same should happen the chattels so brought upon or about the premises should be deemed to be vested in and should thenceforth become the property of the trustee under it upon the same trusts as were declared concerning the chattels assigned by the settlement, it was held that the effect of such a covenant was that the trustee under the settlement acquired the legal property to the chattels as soon as they were brought upon the premises, but as it was entirely optional with the settlor whether they should be settled or not, he being under no obligation to bring them upon the specified premises his doing so was purely voluntary, and being within two years of the settlor's insolvency, the trustee in insol-

(x) *Franklyn v. Danby*, 12 V.L.R., at p. 876.



veny was declared to be entitled to the funds arising from the sale of the chattels (y). CHAP. V.

A marriage which is *bond fide* and real although the settlor is in very straightened circumstances and that is known to his wife is a good consideration for the purchase of property settled on the wife in defiance of the settlor's creditors (z). Though the settlor is guilty of fraud that will not prevail against his wife (the settlee) unless she was shown to be connected with it. The burden of proving that the wife was a party to the fraud is upon those who impugn a settlement of this kind, but where all the facts concerning the settlement are within the knowledge of the settlor and settlee and not within the knowledge of the creditors a very slight degree of evidence will be sufficient to shift the burden (a). Notwithstanding the consideration of marriage a settlement executed in anticipation of the possible result of litigation may be as fraudulent as if after the result is known, as where a settlement was made pending a suit in which a decree was subsequently obtained against the settlor was held, from the circumstances, to be void (b).

The next exception, *settlements made bond fide in pursuance of an ante-nuptial contract*, is not contained in the section of the English Act from which the section was adopted, 32 & 33 Vict. c. 71, s. 91. As to these made *bond fide* in pursuance of an ante-nuptial contract.

The third exception comprises settlements made in favour of purchasers or incumbrancers in good faith, and for valuable consideration. In this instance also it is not necessary that both parties to the transaction should act in good faith—it is sufficient if there be good faith on the part of the purchaser (c). The meaning of the words “a purchaser or incumbrancer in good faith and for valuable consideration” is a person who has for valuable consideration acquired property affected with some infirmity, without notice of the existence of such infirmity (d). As to those made in favour of purchasers or incumbrancers in good faith and for valuable consideration.

(y) *Franklyn v. Danby*, 12 V.L.R., 863.

(z) *Michael v. Thompson*, 20 V.L.R., 548; 16 A.L.T., 124.

(a) *Ibid.*

(b) *In re Solomon*, 1 W.W. & a'B. (L.), 45.

(c) *Mackintosh v. Pogose*, (1895) 1 Ch. 505.

(d) *Ibid.*, at p. 510; and as to circumstances creating a purchaser for valu-

able consideration *vide Hance v. Harding*, 20 Q.B.D., 732, discussing *Ex parte Hillman, in re Pumfrey*, 10 C.D., 622; and *vide Bloomfield v. Rummage*, 3 A.L.R., 248; 19 A.L.T., 115, in which it was held that a verbal promise made by a son to maintain his parents for the rest of their lives was a sufficient consideration to take the transfer out of the operation of the section.

CHAP. V. As to the words "good faith" and "valuable consideration" see *post* as to fraudulent preferences of property.

Onus of proof as to valuable consideration.

The proof that valuable consideration was given lies upon the person claiming under the settlement (e).

Parol evidence admissible.

Parol evidence is admissible to show whether the settlement is made for valuable consideration or not and thus, though it appear voluntary in form, it may be shown to have been made for valuable consideration (f).

Meaning of "purchaser."

As the Act is a special code of law relating to bankruptcy as a general rule for commercial men, it must be expected to use words in it in the sense in which commercial men use them; therefore the word "purchaser" means a "buyer" in the ordinary commercial sense, not a purchaser in the legal sense of the term (g). The above interpretation of the term "purchaser" has since been indicated to mean that the word "purchaser" must not be treated as a conveyancing term, but must be considered as applying to cases where there is a *quid pro quo*, and that in order to make a purchaser within the section there must be valuable consideration given (h). A consideration therefore that would support a transaction under 27 Eliz. c. 4 as an assignment of leasehold, the assignee becoming liable to pay the rents and perform the covenants of the lease, and being therefore in the legal sense a purchaser, will not support a transaction under this section (i).

As to settlements made of property accrued in right of wife.

The fourth exception stated by the section is a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife.

Contracts and covenants.

*Thirdly.*—Contracts and covenants. The third matter dealt with by the section is that any contract made in consideration of marriage for the future settlement upon or for the wife or children of the settlor of any money or property wherein the settlor had not at the date of his marriage any estate or interest,

(e) *Gray v. Faram*, 5 V.L.R. (E.), 270.

10 C.D., 622.

(f) *Bayspoole v. Collins*, L.R., 6 Ch. 228; *Bloomfield v. Rummage*, 3 A.L.R., 248; 19 A.L.T., 115.

(h) *Hance v. Harding*, 20 Q.B.D., 732.

(g) *Ex parte Hillman, in re Pumfrey*,

(i) *Vide Ex parte Hillman, in re Pumfrey, ante*, explaining *Price v. Jenkins*, 5 Ch. D., 619.

whether vested or contingent in possession or remainder and not being money or property of or in the right of his wife upon his becoming insolvent before such property or money has been actually transferred or paid pursuant to such contract or covenant, becomes void against his assignee or trustee.

As well as the property excepted by and as set out in this portion of the section the same has been held not to apply to a common covenant to pay a sum of money to trustees of a marriage settlement, that is a covenant for the payment of a sum of money not specifically earmarked, and that therefore where the settlor covenanted that he during his life or his representatives within twelve months after his death, would pay a certain sum to the trustees of the settlement, to be held by them on the trusts of the settlement, and the settlor subsequently became bankrupt, the trustees were entitled to prove against the estate (*k*).

*Fourthly*.—"Settlement" for the purposes of this section includes any conveyance or transfer of property. The original Statute in respect to this section is 1 Jac. I., c. 15, s. 5. The word "settlement" did not appear there however, but was introduced for the first time in the English Act of 1869 (*l*). It has been stated that perhaps the object of the change was on the one hand to indicate that the section was not intended to apply to transfers of property which from the nature and circumstances of the transfer showed that the "donor" did not contemplate the preservation of the actual subject matter of transfer by the transferee, and on the other hand to indicate that the section did apply to the transfer even of a sum of money when the intention was manifest that the money should be preserved either in its original form or in some other form of investment (*m*). The same authority adds it is difficult to account for the use of the word settlement in substitution for the words previously used, "transfer" or "conveyance," unless it was intended to indicate that the transaction to fall within the Act must manifest a contemplation by the "donor" of the permanency of the subject matter of the

Meaning of  
"settlement" in  
the section.

(*k*) *In re Knight, ex parte Cooper*, 2 Morrell, p. 223; following *Ex parte Bishop, re Tounies*, L.R. 8 Ch. App., 718.

(*l*) 32 and 33 Vict. c. 71, s. 91. *In re Vansittart, ex parte Brown*, (1893) 1 Q.B., p. 183.

(*m*) *Ibid*.

**CHAP. V.** transfer as the property of the transferee (*n*). Another authority says (*o*) one must look at the whole of the section in applying the definition and consider what is meant by "settlement." Although "settlement" for the purposes of the section, includes any conveyance or transfer of property a settlement in the ordinary sense of the word is intended; the end and purpose of the thing must be a settlement that is a disposition of property to be held for the enjoyment of some other person, or in other words before a transaction can be regarded as a "settlement" there must be a creation of some beneficial interest in some one in whom it was not before (*p*). In holding that a deed of assignment for the benefit of creditors was not within the section where it was contended that such a deed came within the literal definition of the word "settlement" given at the end of the section, it was stated that the transaction to be "obnoxious" to the section must be either a settlement as ordinarily understood or at all events something of an analogous nature (*q*).

Settlements  
where deceased  
debtor's estate  
sequestrated.

As to settlements in respect to the administration of a deceased debtor's sequestrated estate, *vide* "Deceased Persons' Estates," Chapter IV., at p. 94.

Parties to  
proceedings.

The assignee or trustee of the estate is the only person to take proceedings to set aside a settlement; it cannot, it has been held, be done at the suit of a creditor on behalf of all the creditors, although the official representative of the estate, having declined to institute the proceedings, is made a defendant (*r*); but where the trustee refused to institute proceedings, and the majority of the creditors were opposed to litigation, the minority in favour of proceedings were held to be entitled to apply to the Court for leave to use the trustee's name on giving him an indemnity (*s*). The proceedings, however, should be for the benefit of creditors generally, and not for a particular creditor (*t*). When the defendant was a married woman it was held that her husband was not a necessary party (*u*). The depositions

(*n*) See also *Flanagan v. Bladen*, 17 A.L.T., 69; 1 A.L.R., 62.

(*o*) *In re Player, ex parte Harvey*, 15 Q.B.D., 682, approved of in *Danby v. Davey*, 13 V.L.R., at p. 965.

(*p*) *In re Wiseman*, 17 A.L.T., 251; *Wiseman v. The Collector of Imposts*, 21 V.L.R., 743.

(*q*) *Davey v. Danby* 13 V.L.R.,

at p. 965.

(*r*) *Douglas v. McIntyre*, 10 V.L.R. (E.), 249.

(*s*) *Ex parte Kearsley, in re Genese*, 17 Q.B.D., 1.

(*t*) *Ex parte Cooper, in re Zucco*, 10 L.R. Ch., 510.

(*u*) *Shiels v. Drysdale*, 6 V.L.R. (E.), 126.

already made in examinations in the Insolvency Court by a defendant are admissible in evidence in proceedings to set aside a voluntary settlement, and may be sufficient to establish the plaintiff's case. The whole of such depositions will be regarded as in evidence, and the Court will attach such weight to the different parts as it considers them entitled to (*v*).

The section differs from s. 47, of 46 & 47 Vict. c. 52, inasmuch as it includes the additional exception of settlements made *bond fide* in pursuance of an *ante-nuptial* contract and the limitation to settlements made within five years before insolvency instead of within ten years, and does not include the additional burden of proof on parties claiming under settlements referred to under that part of the English section comprised in the words "that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof."

Variation of s. 72, Act of 1890, from 46 & 47 Vict. c. 52, s. 47.

Settlements and transactions void under the provisions of 13 Eliz. c. 5 (*w*) are void against the assignee or trustee in insolvency as representing creditors (*x*). The Statute 13 Eliz. c. 5 has always been both in principle and practical operation quite distinct from and independent of the bankruptcy laws, but has worked concurrently and for the most part harmoniously with the long series of Bankruptcy Acts which have succeeded one another (*y*).

Settlements and transactions void under 13 Eliz. c. 5.

With the exception of (A) settlements made before or in consideration of marriage, (B) settlements made on or for the wife or children or both wife and children of the settlor of property which has accrued to the settlor after marriage in right of his wife, every settlement of property on or for the wife or children or both wife and children made after the commencement of the Act of 1897 is in case of the insolvency of the settlor at any time

Registration of settlements on wife or children.

(*r*) *Davey v. Bailey*, 10 V.L.R. (E.), 240. See also *Danby v. McDonald*, *Argus*, 21st July, 1890.

(*w*) Victorian Statutes, Vol. VII., p. 537.

(*x*) *Ex parte Russell, re Butterworth*, 19 C.D., 588; *Ex parte Chaplin, re Sinclair*, 26 C.D., 319; *Re Ward*, 14 V.L.R., 733.

(*y*) *May on Fraudulent and Voluntary Dispositions of Property*, 2nd ed., 10. The following Victorian cases deal with the subject of the Statute:—*Goodman v. Hughes*, 1 W. & W. (E.), 202; *Shaw v. Salter*, 2 W.W. & a'B. E., 159; *Richmond v. Dick*, 2 W.W.

& a'B. (E.), 143; *Yandell v. Hector*, 4 W.W. & a'B. (E.), 1; *Toohy v. Steains*, 1 V.R. (E.), 49; *In re Healey*, 2 V.R. (L.), 34; *Dallimore v. Oriental Bank*, 5 A.J.R., 38; 1 V.L.R. (E.), 13; *Colonial Bank of Australasia v. Pie*, 6 V.L.R. (E.), 38; *Smith v. Smith*, 3 V.L.R. (L.), 2; *Sinnott v. Hockin*, 8 V.L.R. (E.), 205; *Smith v. Hope*, 9 V.L.R. (L.), 217; *Douglass v. McIntyre*, 10 V.L.R. (E.), 249; *Davey v. Danby*, 13 V.L.R., 957; *Re Ward*, 14 V.L.R., at p. 739; *Askeo v. Danby*, 18 V.L.R., 335; *Grieve v. Bodey*, 20 V.L.R., 269; *Roue v. The Equity Trustees, &c., Co.*, 21 V.L.R., 762.

**CHAP. V.** thereafter absolutely void and of no effect against the assignee or trustee in insolvency unless such settlement is in writing; (A) and if made within twelve months before the insolvency of the settlor and executed within Victoria has been registered seven clear days after the execution thereof by the settlor; or (B) if made within twelve months before the insolvency of the settlor and executed in any place out of Victoria has been registered within twenty-one clear days after the time at which it would in the ordinary course of post arrive in Victoria if posted within one week after the execution thereof by the settlor; or (C) if made more than twelve months before the insolvency of the settlor then wherever executed has been registered at least twelve months before such insolvency (z). The term "settlement" for the purposes of s. 8, Act of 1897, includes any conveyance or transfer of property (z). The only exceptions to registration are those above referred to, and therefore if the settlees be purchasers or encumbrancers in good faith and for valuable consideration registration is essential to avert invalidity in the event of the settlor's insolvency, though such a settlement is exempted from the provisions of s. 72, Act of 1890.

Mode of  
registration of  
settlements.

Rules and forms.

The mode of registration of the settlements referred to is that prescribed by s. 101, Act of 1897, *post*, and the rules relating to the same are those cited as "the Rules under Parts 6 and 8 of "the *Insolvency Act 1897*," *post*. The forms of the necessary affidavit and of the register are scheduled to such rules, Appendix, *post*.

Accidental  
error not to  
invalidate  
settlement.

No settlement is deemed invalid by reason only that in any memorial thereof filed with the Registrar-General there is an omission or incorrect or insufficient description or misdescription in respect of any of the particulars required by law to be contained therein if the Court, judge or justice before whom the validity of such settlement comes into question is satisfied that such omission or incorrect or insufficient description or misdescription was accidental or due to inadvertence or to some cause beyond the control of the settlor, and not imputable to any negligence on his part, and in any case was not of such a nature as to be liable to mislead (a).

(z) S. 100, Act of 1897.

(a) S. 102, *ibid*.

Any settlement which would if made within two years before the insolvency be void as against the assignee or trustee of the insolvent estate, and any covenant or contract which would if made before the insolvency be void as against such assignee or trustee if made by an insolvent after the date of sequestration, and before obtaining an absolute certificate of discharge, is void as against the assignee or trustee (b).

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Fraudulent settlements before absolute certificate void.

The provisions of subdivision 2 of Part VI., Act of 1897, apply *mutatis mutandis* to settlements under Part VIII., Act of 1897, and nothing contained in Part VIII. referred to (except so far as expressly provided) must be construed to repeal or affect any provision of law for the time being in force in relation to settlements or give validity to any settlement which by law is void or voidable (c).

Application of subdivision 2 of Part VI. Act of 1897 to Part VIII. Act of 1897. Saving of general laws.

In either of the following cases, that is to say:—(A) In case of a settlement made before or in consideration of marriage where a settlor is not at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement; or (B) in case of any covenant or contract made in consideration of marriage for the future settlement on or for a settlor's wife or children, or both wife and children, of any money or property wherein he had not at the date of his marriage any estate or interest (not being money or property of or in right of his wife); if the estate of the settlor is sequestrated or he compounds or arranges with his creditors, and it appears to the Court that such settlement, covenant or contract was made in order to defeat or delay creditors, or was unjustifiable, having regard to the state of the settlor's affairs at the time when it was made, the Court may refuse or suspend a certificate of discharge or grant an order subject to conditions or refuse to approve the composition or arrangement as the case may be in like manner as in cases where a debtor has been guilty of fraud (d).

Effect of certain fraudulent settlements on certificate of discharge composition or arrangement.

As to the amount of duty payable on settlements, *vide Stamps Act 1892*, ss. 24 to 30; and as to the effect of non-payment, s. 67, *Stamps Act 1890*.

Duty on settlements.

(b) S. 104, *ibid*.  
(c) S. 105, *ibid*.

(d) S. 103, Act of 1897—compare *Bankruptcy Act 1883*, s. 29.

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## Class I. (d).

*Fraudulent Preferences of Property.*

Fraudulent preferences.

Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own moneys in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors is if the person making, taking, paying or suffering the same become insolvent within three months after the date of making, taking, paying or suffering the same, deemed a fraudulent preference and fraudulent and void as against the assignee or trustee of the insolvent appointed or elected under the Act, but the section does not affect the rights of a purchaser, payee or incumbrancer in good faith and for valuable consideration (e), and to this provision the Act of 1897 adds the proviso that pressure by a creditor shall not be sufficient to exempt any transaction from the operation of the section (f). The section is a transcript of s. 92, *Bankruptcy Act* 1869, and it is the result of an endeavour to reduce into definite legal propositions the law that previously had to be derived from a comparison of the decided cases (g); and the law by means of this section has been put into definite shape and form (h). The decisions prior to the English Statute may be useful as guides, but they cannot be substituted for the section though they can be regarded as far as they throw light on it or are in accordance with it (i).

Nature of the section.

The object of the doctrine is to assist in securing an equal distribution of the insolvent's estate amongst his creditors.

Nature of the doctrine.

*Firstly—The transaction, to be a fraudulent preference and fraudulent and void against the assignee or trustee of the insolvent, can be made by (1) a conveyance or transfer of property*

(e) S. 73, Act of 1890—compare s. 92, *Bankruptcy Act* 1869.

(f) S. 116—compare s. 107, 38 Vict. No. 5, Queensland.

(g) *Michael v. Oldfield*, 13 V.L.R., 808; *Butcher v. Stead*, L.R. 7 H.L., at p. 846.

(h) *Ex parte Griffith, re Wilcoxon*, 23

C.D., at p. 73; *Ex parte Hill, re Bird*, *ibid* at p. 700.

(i) *Ex parte Griffith, ante*. The doctrine was thus originally of judicial creation, and it is said to have arisen for the first time in 1768 in the case of *Alderson v. Temple*, 4 Burr., 2235.



(that is property which is divisible amongst creditors) or charge thereon; (2) by payment; (3) by an obligation incurred; (4) by a judicial proceeding taken or suffered. In each instance the person must be unable to pay his debts as they become due from his own moneys and the transaction must be in favour of any creditor or any person in trust for any creditor. The preference is not limited to actual transfer or incumbrance of property or payment in money, but may be made by allowing a creditor an advantage by suffering judicial proceedings to be taken. The proceedings suffered have been described as a shield between the insolvent and the creditors (k).

"Judicial proceeding taken or suffered."

The question to be established so far as relates to the debtor in the first place is whether he was unable to pay his debts as they became due from his own moneys, that is in the ordinary way (l), and to bring the case within the provisions of the section the transaction must be in favour of a creditor, that is between a debtor and a person who is in the strict sense of the word his creditor (m). Therefore where a debtor sold his stock immediately prior to insolvency to his wife with the intention, as the wife knew, to dispose of the purchase money for the purpose of making a preference in favour of one of the creditors, the sale itself was not void under the section, the purchaser (the wife) not being a creditor (n). The sale, however, was held to be a device to defraud creditors. Again, where the payment was made to make good a breach of trust immediately preceding the act of bankruptcy by a person in insolvent circumstances, as the relation between the parties was one of trustee and co-trustee, and not that of debtor and creditor, the section did not apply (o). The word "creditor" includes a contingent creditor, that is to say, a person who at the date of payment would be entitled if the debtor became insolvent to prove in respect of a contingent liability, as, for instance, where a debtor within the statutory period and with a view to prefer a person paid into his bankers

(k) *Kerr v. Gray*, 3 W.W. & A.B. (I.), 34; vide also *Lancaster v. Marsden*, 25 C.D., 311.

(l) *Jacomb v. Ross*, 4 A.J.R., 44, 97.

(m) *Ex parte Kelly*, in *re Smith, Fleming and Company*, 11 C.D., 306.

(n) *In re Ward*, 14 V.L.R., 733.

(o) *Ex parte Taylor*, in *re Goldmid*,

18 Q.B.D., at p. 295; vide also *Ex parte Stubbins*, *re Wilkinson*, 17 Ch. D., 58, and *Ex parte Kelly*, *re Smith, Fleming & Co.*, ante, where persons were held not to be creditors; and *Re Bear*, *ex parte Official Receiver*, 3 Morrell, 129; *New, Prance and Garrard's Trustee v. Hunting*, (1897) 1 Q.B., 607.

CHAP. V. a sum of money to meet a bill which that person had accepted for his accommodation and which had been discounted (*p*).

*Secondly—The transaction must be made with a view of giving such creditor a preference over the other creditors.*

The preference of the particular creditor need not be the sole object or motive of the debtor. The desire to prefer need only be the *substantial* or dominant motive and not the sole motive of the debtor (*q*). It will be sufficient if it be a real and operative view at the time the debtor makes the transfer (*r*), that is if the debtor acts with a view, a real operative view or intent though it be not his sole or principal view or intent of giving one of his creditors a preference or advantage over his other creditors, it is sufficient (*s*). The section does not emphasise the word "a" (*t*). If the debtor had a preference in view not merely as a possible or probable consequence of his act but as a desire to give a preference determining his act it suffices, and therefore it is not necessary that the preference should be the sole object (*t*). The debtor must be taken to have known the effect of his act would be to give an immediate advantage to the creditor (*u*) for every man must be supposed to intend the apparent and inevitable result of his acts, and therefore when debtors hopelessly insolvent transfer the whole of their property with a small exception to their largest creditor on the eve of insolvency in consideration of a past debt only they could have no other view than that of preferring the creditor (*v*). The preference must be over the other creditors. This would include the case of one creditor where two are the total number of creditors (*w*), but where an individual creditor would be benefited and not the general body of creditors the section does not apply, and in such a case the trustee should not allow his name to be used to impeach the transaction nor can the individual creditor impeach it in his own name (*x*).

Pressure.

Under the Act of 1890 it was held that the act of the debtor had to be voluntary and that the preference had to be his real

(*p*) *In re Paine, ex parte Read*, (1897)

1 Q.B., 122; 3 Manson, 309.

(*q*) *Ex parte Hill re Bird*, 23 Ch. D., 695.

(*r*) *Michael v. Oldfield*, 13 V.L.R., at p. 809.

(*s*) *Ibid.*

(*t*) *Ibid.*, at p. 812.

(*u*) *Ibid.*, at p. 809.

(*v*) *Mackay v. Jellie*, 17 V.L.R., 91.

(*w*) *Acts Interpretation Act* 1890,

s. 5. *In re Rickards*, 5 A.J.R., 103.

(*x*) *Ex parte Cooper, in re Zucco*, 10 L.R. Ch., 510.

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controlling and governing motive (*y*), and therefore pressure of the creditor or anything done by the creditor *bond fide* so as to interfere with or control the act of the debtor was sufficient to take the transaction out of the operation of the section (*z*), but the Act of 1897 (*a*) now specifically provides that pressure by a creditor shall not be sufficient to exempt any transaction from the operation of the section.

Effect of Act of 1897.

*Thirdly—It is necessary that the debtor should become insolvent within three months after the date of the transaction.* If the three months have expired from the act of the debtor the same is not void, notwithstanding the fact that it would have been a fraudulent preference, if the stated period had not expired (*b*). In calculating the three months the day on which the petition is presented is excluded (*c*).

Insolvency of debtor within three months necessary.

*The section does not affect the rights of a purchaser payee or incumbrancer in good faith and for valuable consideration.*

The words "good faith" have frequently been the subject of judicial interpretation, and the definition (*d*) "without notice that any fraud or fraudulent preference is intended" has been adopted in this colony (*e*). If a person is found receiving a payment in complete ignorance of or without means of getting information with regard to the matters mentioned in the earlier part of the section he may be a payee in good faith (*f*). Thus the good faith of a creditor must be tested by his knowledge of the surrounding circumstances, his knowledge of the debtor's intention and of the consequences of his acts (*g*). The words "valuable consideration" have been found more difficult to explain. They (*h*) are capable of the construction that they are used to negative the payment of a voluntary bond or covenant for which

"Good faith" and "valuable consideration."

(*y*) *Michael v. Oldfield*, 13 V.L.R., at p. 812.

(*z*) *Vide Mackay v. Jellie*, 17 V.L.R., 91; *Ex parte Hall, re Cooper*, 19 C.D., 584; *Davey v. Walker*, 18 V.L.R., 175; *Graham v. Candy*, 3 F. & F., at p. 208; *Shaw v. Solomon*, 1 V.R. (E.), 182; *In re Schlieff*, 6 V.L.R. (I.), at p. 54; *Ex parte Craven, ex parte Tempest*, L.R. 10 Eq., 648; *Ex parte Blackburn, re Cheeseborough*, L.R. 12 Eq., 358.

(*a*) S. 116—compare 38 Vict. No. 5 (Queensland), s. 107.

(*b*) *Re Liverpool and London Guarant-*

*tee Company, Gallagher's Case*, 46 L.T., 54.

(*c*) *In re Dawes, ex parte Official Receiver*, 4 Manson, 117.

(*d*) *Ex parte Butcher, re Meldrum, Butcher v. Stead*, L.R. 7 H.L., p. 847.

(*e*) *Michael v. Oldfield*, 13 V.L.R., 810; *Cohen v. McGee*, 4 V.L.R. (L.), 556.

(*f*) *Tomkins v. Saffery*, 3 App. Cas., at p. 226.

(*g*) *Wootton v. Stoffers*, 16 A.L.T., 10.

(*h*) *Butcher v. Stead*, L.R. 7 H.L., 839.

CHAP. V. no value was given; or they may have been used as applicable to the words "purchaser or incumbrancer," though less applicable or not applicable at all to the word "payee." The words "in good faith and for valuable consideration" were taken to indicate that it might be that either a voluntary bond for a payment or some other voluntary instrument might have been given by a debtor if he was willing to favour a relative or any other individual; but in order that the favoured individual to whom he had given such a bond or made a payment should be exempted from the previous part of the section he must have received it *bond fide*, that is he must not be conscious himself of an intention to favour himself above the other creditors, and he must further have given "valuable consideration" for it. That will entitle him to hold the payment so made in preference, he himself not being a guilty party, that is not being conscious of a preference being given to him (*h*).

Where the transaction was found to be made by a person unable to pay his debts as they became due from his own moneys within three months of the sequestration of the estate intending to give the defendant a preference over the other creditors, and the judge could not find that the debtor had executed the mortgage in consequence of an honorable obligation, and where the defendant knew that the debtor was considerably pressed for money but was doing his best to protect himself, and determined if he could, to be the first in the field and first to be secured, but with no knowledge or certainty of the debtor being insolvent, and not with any idea that the insolvent was preferring him to anybody else, the mortgage was declared to be a valid transaction and consequently within the terms of the proviso (*i*). The transaction is none the less a fraudulent preference if it is done with a reasonable hope of staving off bankruptcy proceedings or under a sense of moral obligation or honor on the part of the debtor to indemnify the preferred creditor (*k*).

The decisions when occasion has arisen are careful to point out circumstances to which the doctrine of fraudulent preference cannot be applied. A payment to a creditor in the ordinary course of business cannot be said to be given with a view to give an undue

(*h*) *Butcher v. Stead*, *ante*.

(*i*) *Davey v. Bullock*, 17 V.L.R., 3.

(*k*) *In re Vingoe, ex parte Viney*, 1 Manson, 416.

preference (*l*) nor a payment made by the debtor answering to the description in the section to a creditor with the object of benefiting the debtor's surety (*m*), nor a mortgage made by a debtor unable to pay his debts as they became due one month before sequestration, where it originated, not in demand of the creditor, its execution being so far voluntary by the debtor that he was not pressed to execute it at the time, but in what was much stronger, an antecedent contract entered into for valuable consideration (*n*), nor where money was obtained from the debtor under a previous equitable arrangement and held subject to that (*o*); nor where the transaction was not with a creditor (*p*); nor where an individual creditor only could be benefited by setting aside the transaction, and not the general body of creditors (*q*). Where the object of the debtor in executing a conveyance of an estate is to shield himself from the consequences of breaches of trust committed by him and not to prefer some creditors to others, the conveyance is not a fraudulent preference (*r*), and it has been held that bills of exchange given by a trader stand on a peculiar footing, and though a trader knowing himself to be insolvent continues business and gives a bill in the ordinary course of business and meets the same within the three months of bankruptcy such is not of itself a fraudulent preference (*s*); but where a bill of exchange is not presented for payment at maturity, but is held over at the request of the acceptor, and subsequently paid, such payment is not within the principle of the case last cited, as it is not a payment in the ordinary course of business (*t*).

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Cases held to be outside the doctrine.

As to fraudulent preference in respect to a deceased debtor's sequestrated estate, *vide* "Deceased Persons' Estates," *ante*, at p. 94.

Fraudulent preference as to deceased debtor's sequestrated estate.

The onus is on the trustee when impeaching a payment as constituting a fraudulent preference of not merely showing the

Evidence as to fraudulent preference.

(*l*) *Per Lord Blackburn, Tomkins v. Saffery*, 3 App. Cases, p. 235.

(*m*) *Ex parte The Official Receiver, in re Mills*, 5 Morrell, 55. *Sed vide, In re Paine, ex parte Read*, (1897) 1 Q.B., 122; 3 Manson, 309.

(*n*) *Griere v. Bodey*, 20 V.L.R., 269.

(*o*) *Anderson v. Jacomb*, 2 W. & W. (L.), at p. 272.

(*p*) *In re Ward*, 14 V.L.R., 733.

(*q*) *Ex parte Cooper, in re Zucco*, 10 L.R. Ch., 510.

(*r*) *New, Prance, and Garrard's Trustee v. Hunting*, (1897) 2 Q.B., 19; 4 Manson, 103.

(*s*) *In re Clay*, 3 Manson, 31.

(*t*) *In re Eaton, ex parte Viney*, (1897) 2 Q.B., 16; 4 Manson, 111.

**CHAP. V.** "insolvency" of the debtor, but also of proving that the payment was made by him with a view to prefer the particular creditor (*u*).

The insolvent's schedule and affidavit are inadmissible to show the state of his finances at the time of giving the preference, so are proofs of debt and letters making claims against the insolvent to show the existence of creditors at the time of giving the preference, where the claims have not been dealt with by the assignee, but if they have been accompanied by uncanceled promissory notes signed by the debtor such notes may be admitted to show his inability to pay his debts as they become due at the time when the preference was given (*v*). The subsequent conduct of the person claiming in good faith is admissible as evidence of previous knowledge and intendment (*w*), as for example his exertions to stave off another creditor's claim until the expiration of three months with the intention of preventing the conveyance to him of being a fraudulent preference (*x*).

Fraudulent preference as an act of insolvency.

A fraudulent preference is an act of insolvency, *vide* s. 37 (10), Act of 1890, and the act of insolvency set out in sub-s. 2 of the same section (*y*), is large enough to cover a fraudulent preference, as every fraudulent preference comprehends an intention to defeat or delay creditors, for if one creditor be fraudulently preferred, another must be defeated or delayed, but the converse is not so, for obviously a man may intend to defeat or delay his creditors without intending to prefer one of them, for he may intend to cheat the whole of them.

Fraudulent preference and the Imprisonment of Fraudulent Debtors Act 1890.

A transfer of property which would be a fraudulent preference does not constitute an offence under the *Imprisonment of Fraudulent Debtors Act* 1890, s. 22 (1), (c) and (d) (*z*). The Act referred to is a penal statute to be construed strictly, and the intent to defraud under (c) and (d) refers to actual and not constructive fraud. It is no fraud at common law to prefer one creditor to another, but it arises, if a sequestration occurs within three months of such, a fraudulent preference may be merely

(*u*) *In re Laurie, ex parte Green*, 5 Manson, 48; and *vide Ex parte Lancaster, in re Marsden*, 25 C.D., 311.

(*v*) *Griever v. Bodey*, 20 V.L.R., 269.

(*w*) *Wootton v. Stoffers*, 16 A.L.T., at p. 14.

(*x*) *Ibid.*

(*y*) *Michael v. Oldfield*, 13 V.L.R., at p. 813.

(*z*) *Federal Grocery Co. v. Noble*, 18 A.L.T., 46; 2 A.L.R., 270.

constructively fraudulent and may not involve any fraud in the ordinary acceptation of the word (a). CHAP. V.

The doctrine of fraudulent preference is applied also to companies registered under Part I. of the *Companies Act 1890* as well as to individuals and partnerships, and any such conveyance, mortgage, delivery of goods, payment, execution or other act relating to property, as would, if made or done by or against any individual person, be deemed, in the event of his insolvency, to have been made or done by way of undue or fraudulent preference of the creditors of such person if made or done by or against any company is deemed, in the event of such company being wound up under Part I. of the *Companies Act 1890*, to have been made or done by way of undue or fraudulent preference of the creditors of such company and is invalid accordingly (b). In the case of a company being wound up by the Court or subject to the supervision of the Court the presentation of a petition for winding up corresponds with the act of insolvency in the case of an individual and in a voluntary winding up the resolution for winding up corresponds likewise (c).

S. 74, Act of 1890, contains a provision as to the protection of certain transactions with the insolvent adapted from 32 & 33 Vict. c. 71, s. 94. By the English Statute the bankruptcy related back to the committal of the act of bankruptcy, and the section referred to was necessary for the protection of persons having transactions in good faith with the bankrupt after the act of bankruptcy and without notice of the same. The provision referred to is as follows:—Nothing in this Act contained shall render invalid

(I.) Any payment made in good faith and for value received to any insolvent before the date of the order of sequestration :

(II.) Any payment or delivery of money or goods belonging to an insolvent, made in good faith to such insolvent by a depository of such money or goods before the date of the order of sequestration :

(a) *Ibid.*

(b) S. 151, *Companies Act 1890*.

(c) *Ibid.*

Fraudulent preference in respect to trading companies registered under *Companies Act 1890*.

Protected transactions.

## CHAP. V.

(III.) Any contract or dealing with any insolvent, made in good faith and for valuable consideration, before the date of the order of sequestration (*d*).

The third paragraph does not cover an assignment of the future receipts of a business after sequestration has intervened though made for value and the assignees title is therefore inoperative against that of the trustee (*e*).

## Class II.

*The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit (f).*

All that is given to the trustee is a capacity to do to the same extent, and in the same manner, what the bankrupt might have done, and therefore, if a power be given to the bankrupt to be exercised with the consent of a third person the trustee cannot exercise that power without such consent, nor has he the capacity to exercise a power limited in time after expiration of the period, and therefore where a debtor has a general power of appointment by deed or will, the power no longer exists after his death, and consequently the trustee has no capacity to exercise it, and is incapable of making a good title under the power (*g*). The power may also be exercised by the insolvent with the consent of the trustee who should obtain the leave of the Court to consent (*h*). Where the power is what is termed personal in the bankrupt as the capacity to make a will it is improbable that such would pass to the trustee, as no man but the bankrupt can make his will (*i*). A mere power unexecuted in a tenant for life who has become bankrupt does not vest in the trustee (*k*).

(*d*) S. 74, Act of 1890.

(*e*) *Ex parte Nichols, re Jones*, 22 C.D., 782; distinguishing *Brice v. Bannister*, 3 Q.B.D., 569.

(*f*) S. 70 (iv.), Act of 1890. The later s. 85 (v.), specifically authorises the trustee to exercise any powers the capacity to exercise which is vested in him under the Act, and to execute all powers of attorney, deeds and other instruments expedient or necessary for the purpose of carrying into effect the provisions of the Act, and the vesting clauses dealt with in the early part of this division show how property becomes vested in the trustee.

(*g*) *Nichols to Nixey*, 29 C.D., 1005.

(*h*) *In re Cooper, Cooper v. Slight*, 27 C.D., 565.

(*i*) *Vide* Sugden on Powers, 8th ed., 188, referring to *Smith v. Wheeler*, 1 Ventr., 128, at p. 131; *Jenney v. Andrews*, 6 Madd., 264.

(*k*) *Townsend v. Windham*, 2 Ves., 3. As to powers where a bankruptcy has occurred: *vide Thorpe v. Goodall*, 1 Rose, 40; *Coleman v. Britain*, 2 B. & Ald., 93; *Hole v. Escott*, 8 L.J., N.S. Ch., 83; *Baddam v. Mee*, 1 Myl. & K., 32; *Hawvell v. Haswell*, 30 L.J., Ch., 97, and generally Sugden on Powers, 8th ed.



*Class III.*

## CHAP. V.

*Property the subject of reputed ownership.*

The third class of property divisible amongst the insolvent's creditors as set out in this chapter is that property which is the subject of reputed ownership.

*All goods and chattels being at the date of the sequestration in the possession order or disposition of the insolvent by the consent and permission of the true owner of which goods and chattels the insolvent is reputed owner or of which he has taken upon himself the sale or disposition as owner. Things in action other than debts due to him in the course of his trade or business are not deemed goods and chattels within the meaning of this provision (l).*

The doctrine of reputed ownership operates—

1. If the goods and chattels are at the date of the sequestration in the possession, order, or disposition of the insolvent.
2. By the consent and permission of the true owner.
3. Of which goods the insolvent is the reputed owner ; or of which he has taken upon himself the sale or disposition as owner.

Goods and chattels include debts due to the insolvent in the course of his trade or business ; other things in action are not within the expression goods and chattels within the meaning of the enactment (m).

The time of the possession, order, or disposition of the insolvent is restricted to the date of the sequestration, and therefore the question of "possession, order, or disposition" is essentially one of fact for the jury (n), but it need not be an actual or personal possession, as for instance, the possession of the insolvent's servant or agent or a constructive possession is sufficient (o), but the possession must be the possession of the insolvent, as in

(l) S. 70 (5), Act of 1890—compare 32 & 33 Vict. c. 71, s. 15, and 46 & 47 Vict. c. 52, s. 44.

(m) *Ibid.*

(n) *Emerson v. Barnett, re Hawkins*,

20 W.R., 110.

(o) *Vide Jackson v. Irvin*, 2 Camp., 48 ; 11 R.R., 658 ; *Ex parte Roy, re Sillence*, 7 C.D., 70.

"Possession, order or disposition" a question for the jury.

CHAP. V. the case of the estate of one partner becoming sequestrated it was held that to bring partnership goods within the clause they must have been in the sole and absolute possession of the bankrupt partner (*p*). In the insolvency of the firm the possession must be shown to be that of the firm (*q*). Where the articles were in possession at the place of business of the alleged reputed owner and were not in their nature connected with such business stronger evidence was required to prove the reputed ownership than in the case of articles connected with the business (*r*).

Goods in possession of warehousekeepers, &c.

Goods subject to duly registered bill of sale.

Goods subject to a contract of letting and hiring.

Registered mortgage of ship or share therein.

Goods the subject of a notorious transfer.

As to warehousekeepers or wharfingers who have goods in their possession or control the same are not deemed to be in the possession, order or disposition of any insolvent by reason only of the same being or remaining in his name in the books of the warehousekeeper or wharfinger or of no notice of any change of ownership in the goods having been given to the warehousekeeper or wharfinger (*s*), as the warrant for goods when duly endorsed passes the possession as well as the property in the goods (*t*), and the doctrine does not apply to invalidate a duly registered bill of sale (*u*), but goods the subject of a contract of sale and letting and hiring (*v*) are apparently not so protected (*w*). A registered mortgage of ships or any share therein prevails against the insolvency after the date of the record of such mortgage notwithstanding the mortgagor at the time of his becoming insolvent may have in his possession and disposition, and be reputed owner of such ship or share (*x*). Such mortgage is preferred to any right claim or interest in such ship or share which may belong to the assignee of such insolvent (*y*).

In cases where the transfer of the property is notorious, the doctrine does not apply, as where the goods are seized by the sheriff and sold by public auction the transfer of property will be held *prima facie* to have been notorious, and such goods, although

(*p*) *In re Bainbridge, ex parte Fletcher*, 8 Ch. D., 218.

(*q*) *Vide Iversen v. Rowland*, 12 V.L.R., 57.

(*r*) *Ex parte Lovering, re Murrell*, 24 C.D., 31.

(*s*) S. 231, *Instruments Act* 1890.

(*t*) *Ibid.*, s. 230.

(*u*) *Ibid.*, s. 147.

(*v*) Ss. 153 and 154 of the *Instruments Act* 1890.

(*w*) *See Re Clancy*, 2 A.L.R. C.N., June 9th, 1896; and *vide also Ex parte Lovering, in re Jones*, L.R. 9 Ch. Ap., 621, following *Lingham v. Biggs*, 1 B. & P., 82; and *Lingard v. Messier*, 1 B. & C., 308, distinguishing *Ex parte Watkins, in re Couston*, L.R. 8 Ch., 520, in which there was a trade custom. (*x*) 17 & 18 Vict. cap. 104, s. 72; 7 Vict. Statutes, 700.

(*y*) *Ibid.*

left in the possession of the insolvent will not pass to his trustee or assignee (z), and also where the possession is of an officer appointed by a Court having jurisdiction such as a receiver the doctrine does not apply (a); nor does it where there is a distress for rent (b). Neither does it when the possession is that of a tradesman where goods are notoriously left by parties for other purposes than for sale, and though they stand amongst those in the shop for sale (c).

CHAP. V.

Possession of tradesman.

The property is not in the order or disposition of the insolvent when he holds the same as a *bond fide* trustee, as he is then the true owner (d), but trust personal property may be the subject of reputed ownership, and it will pass to the estate if the beneficiary has allowed the trustee to deal with it as his own and in a manner inconsistent with the trust (e).

Possession as trustee.

If the possession is that of a factor or agent the reputed ownership clause, it appears, applies, unless the relation of principal and factor is notorious (f).

Possession as factor or agent.

If the vendor of goods, in the exercise of his right of stoppage *in transitu*, notifies to the carrier to stop them *in transitu*, but he by mistake delivers them to the purchaser, the goods do not pass, and if the purchaser's estate has become sequestrated the goods are not in his order or disposition with the consent of the true owner (g).

Possession or delivery by mistake.

As a married woman is subject to the insolvency law (h), the doctrine necessarily applies, and she would therefore be capable of consenting to and permitting her husband to be the reputed owner of such at the date of his insolvency, and for the same reason she would be capable of being a reputed owner in the event of her own insolvency. Where the husband and wife are jointly in possession or the possession is doubtful, as where goods were in the conjugal domicile in which the husband and wife

Possession of married woman.

Joint possession of husband and wife.

(z) *Re Nicholls*, 9 A.L.T., 80.(a) *Taylor v. Erkersley*, 5 C.D., 740.(b) *Per Bramwell, J. in Meggy v. Imperial Discount Co.*, 3 Q.B.D., at p. 716.(c) *Hamilton v. Bell*, 10 Ex., 545.(d) *Joy v. Campbell*, 1 Sch. & Lef., 328; 9 R.R., 39; vide *In re Mills Trusts*, *infra*; and *Great Eastern Railway Company v. Turner*, L.R. 8 Ch., 149, dis-tinguishing *Ex parte Watkins*, in *re Kidder*, 2 Mont. & Ay., 348.(e) *Vide Kitchen v. Ibbetson*, 43 L.J. Ch., 52.(f) *In re Fawcus, ex parte Buck*, 3 C.D., 795.(g) *Litt v. Cowley*, 7 Taunt., 169; 17 R.R., 482.

(h) S. 119, Act of 1897.

- CHAP. V. were living together and so placed that it could not be said which of them had the actual possession of the goods, the situation of the goods is consistent with their being in possession of either the husband or the wife, and whoever has the legal title the possession is attributed to (i), and nothing contained in the *Married Women's Property Act* 1890, gives validity as against creditors of the husband to any gift by a husband to his wife of any property which after such gift shall continue to be in the order and disposition or reputed ownership of the husband (k).
- Gifts to wife.
- Meaning of "true owner." 2. *By the consent and permission of the true owner.* True owner means the person who has the legal right to possession, and the power of dealing with the property (l), therefore trustees who have accepted the trusts are true owners (m), and apparently a bank who has had bills of lading endorsed absolutely to it in consideration of advances is a true owner (n). Consent and permission can be determined by the owner either taking possession or by demanding the goods before sequestration (o). Consent is withdrawn of the whole of the goods if possession is taken of part (p). Where the goods are incapable of actual delivery constructive or symbolical delivery suffices (q). The words "consent and permission" imply knowledge by the true owner of the reputed ownership (r), and if there is no evidence of knowledge the doctrine of reputed ownership has no application (s). The "consent and permission" is necessarily that of a person who can legally consent and permit, and therefore infants or married women restrained from anticipation cannot effectually do so, as where the trustees named in a settlement of property of a person who subsequently became bankrupt, having never executed or had any knowledge of the settlement or on being informed of it declining the trusts, the beneficiaries and not the intended trustees are "the true owners" for the purpose of giving the
- Determination of consent and permission.
- The words "consent and permission" imply knowledge by true owner.
- The consent and permission must be by persons who can legally consent.

(i) *Ramsay v. Margrett*, (1894) 2 Q.B., 18.

(k) *Married Women's Property Act* 1890, s. 13.

(l) *Vide* Yate Lee and Wace, 3rd ed., p. 388; *vide* *In re Mills' Trusts*, (1895) 2 Ch., at p. 569; and *vide* *Great Eastern Railway Company v. Turner*, ante.

(m) *Ibid.*

(n) *Vide* *The Federal Bank of Australia Ltd. v. White*, 21 V.L.R., 451; 17 A.L.T., 189; 1 A.L.R., 145. *Sed*

*vide* *Sewell v. Burdick*, 10 A.C., 74.

(o) *Ex parte Montagu, in re O'Brien*, 1 C.D., 554; *Ex parte Ward, in re Coulson*, L.R., 8 Ch., 144; *Smith v. Topping*, 5 B. & A., 674.

(p) *Re Eslick, ex parte Phillips*, 4 C.D., 496.

(q) *Manton v. Moore*, 7 T.R., 67.

(r) *Per Jessell, M.R., Ex parte Ford, in re Caughey*, 1 Ch. D., at p. 528.

(s) *Ibid.*

necessary consent and permission to the property being in the order or disposition of the bankrupt as reputed owner (t). CHAP. V.

3. *Of which goods the insolvent is the reputed owner or of which he has taken upon himself the sale or disposition as owner.* The doctrine applies where goods are held in such a situation as to convey to persons exercising reasonable judgment the belief that they are the property of insolvent when in possession of them (u). This is always a question of fact (v). The policy of the law is that it takes in the event of bankruptcy the property of the person who has left it in the hands of the bankrupt (i.e. left by him in such circumstances as that credit might have been obtained on it) to pay his general creditors though no credit has actually been obtained (w). And if the bankrupt remains in possession with the reputation of ownership and in those circumstances which create the reputation of ownership then the property will pass, but it is always a question of fact whether or no the circumstances are such as to create that reputation (x). It is enough for the doctrine if the goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment or the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject (x).

The goods may be in such a situation as to be held with the consent of the true owner, but there may be a state of facts established by the evidence that would exclude the operation of the doctrine of reputed ownership in respect to persons dealing with an insolvent as in the case of usage or custom (y). The reason that custom would exclude its operation is that persons who deal with hotelkeepers for instance and come into business contact with them would be assumed in their own interests and for the purpose of their own dealings to have a general idea of how the person with whom they deal is circumstanced (z). All

Custom or  
usage.

(t) *In re Mills' Trusts* (1895), 2 Ch. 564.

(u) *Hantrive v. Hirsch*, 13 A.L.T., 165.

(v) *Ibid.*

(w) *Colonial Bank v. Whinney*, 11 App. Cas. at p. 438.

(x) *Ex parte Watkins*, in *re Couston*, L.R., 8 Ch., 520.

(y) *Danby v. The Colonial Bank of Australasia*, 19 V.L.R., at pp. 595 and 596.

(z) *Ibid.*

## CHAP. V.

Proof of  
custom.

questions of custom assume the existence of persons who in the probability of dealing are interested in knowing the position of those they deal with, their general means of paying and the mode in which the business is ordinarily conducted (a). Whether you go into custom or not the subject of reputed ownership and the rights it confers on creditors to take property which does not belong to the debtor proceeds on the assumption of some groundless belief induced by the act or negligence of another person. It is not a question of ownership at law but of ownership in its ordinary sense (b). The presumption of ownership has been frequently rebutted in various occupations by the possession being within the scope of trade, custom or other usage (c). The foundation of the doctrine of reputed ownership is that a man has been permitted to obtain false credit, and this he cannot do when his possession is consistent with a notorious custom (d); the custom, however, may be such as not to disentitle the general public to assume contrary to it, as it was held the custom of furniture dealers to let out furniture on a three years hiring and purchase agreement did not disentitle the general public to assume that an ordinary householder is the real owner of the furniture which is in his house (e). The custom must be one which the ordinary creditors of the bankrupt may be reasonably presumed to have known, and it may be proved either by reported cases or by evidence of the custom as on a question of fact (f).

Reputed ownership as to debts.

*The expression goods and chattels includes debts due to the insolvent in the course of his trade or business, but all other things in action are excluded. Fixtures attached to the freehold are excluded (g), and also chattels real, as possession is not*

(a) *Danby v. The Colonial Bank of Australasia*, ante.

(b) *Ibid.* In this case it was proved that in Victoria in 80 per cent. of the cases, hotelkeepers give bills of sale over the furniture in the hotel, in most instances to secure amounts larger than the value of the furniture and such fact "knocks away the doctrine of reputed ownership" and cannot create a reputation of ownership in the sense in which the word owner is used in the sub-section. It was also held that there is no custom in Victoria that hotelkeepers hire furniture.

(c) *Ex parte Turquand, in re Parker*, 14 Q.B.D., 636; *In re Blanshard, ex*

*parte Hattersley*, 8 C.D., 601; *Watson v. Peache*, 1 Bing., N.C. 327; *Ex parte Wiggins, in re Nicholls*, 2 Dea. & Ch., 269; *Hamilton v. Bell*, 10 Ex., 545; *Priestly v. Pratt*, L.R. 2 Ex., 101; *Ex parte Powell, in re Matthews*, 1 C.D., 501; *In re Hill*, 1 C.D., 503 (note).

(d) *Vide* judgment of James, L.J., in *Crawcour v. Salter*, 18 Ch. D., at p. 53.

(e) *Ex parte Brooks, in re Fowler*, 23 C.D., 261.

(f) *Ex parte Powell, in re Matthews*, 1 C.D., 501.

(g) *Horn v. Baker*, 9 East 215; 9 R.R., 541; and see *Ex parte Reynal, in re Gye*, 2 M.D. & D., 443.

even *prima facie* evidence of ownership (*h*). To be within the operation of the doctrine, the subject matter must be (A) goods and chattels (B) debts due to the insolvent in the course of his trade or business. In the former class generally all personal chattels are included. Some personal chattels are protected by express enactment against the operation of the section as those the subject of a bill of sale when duly registered (*i*), a ship or a share in it when mortgaged after the date of the record of such mortgage (*k*), wool the subject of a duly registered lien under the *Instruments Act* 1890 (*l*), electric lines, meters and other apparatus (*m*), stock or stock and other chattels on any station in Victoria mortgaged under the provisions of the *Instruments Act* 1890 if such mortgage is executed sixty days before the date of the order for sequestration or for a present advance (*n*), and crops the subject of a duly registered lien under the provisions of the same Act (*o*). As to chattels the subject of a contract of sale and letting and hiring referred to in ss. 153 and 154 of the *Instruments Act* 1890, apparently the person letting the chattels must retake possession before the insolvency of the hirer or do some act to take it out of the operation of the sub-section if such are in the possession of the hirer as reputed owner to prevent them from passing to the trustee, as s. 153 of the Act referred to provides that nothing therein contained shall validate any such contract which would be invalid within the meaning of the *Insolvency Act* 1890 (*p*).

Certain goods and chattels are exempted from the operation of reputed ownership.

Shares in an incorporated company transferable only by deed, are choses in action, and therefore not within the section (*q*), as also is a policy of life assurance (*r*) and the debenture of a company (*s*).

Shares in an incorporated company policy of life assurance and debenture.

As stated the debts are limited to those due to the insolvent in the course of his trade or business, with the exception of such

Debts are limited to those due in the

(*h*) *Vide Ex parte Taylor, re Campbell*, 1 Mont., note (a), at p. 245.

(*i*) *Instruments Act* 1890, s. 147.

(*k*) 17 & 18 Vict. cap. 104, s. 72; Victorian Statutes, Vol. 7, p. 700.

(*l*) *Instruments Act* 1890, s. 168; *Goldbrough v. McCulloch*, 5 W.W. & A.R. (L.), 154; *Stevenson v. Landale*, 1 V.R. (L.), 31; 1 A.J.R., 45.

(*m*) *Electric Light and Power Act* 1896, s. 42.

(*n*) *Instruments Act* 1890, s. 169.

(*o*) *Ibid.*, s. 159.

(*p*) *Vide re Clancy*, 2 A.L.R., C.N. June 9th, 1896.

(*q*) *Colonial Bank v. Whimsey*, 11 App. Cas., 426.

(*r*) *Ex parte Ibbetson, in re Moore*, 8 C.D., 519.

(*s*) *In re Pryce, ex parte Rensburg*, 4 C.D., 685.

**CHAP. V.** debts, it is intended to exclude "all those incorporeal rights which  
course of trade or business. "are not visible or tangible or capable of manual delivery or of  
 "actual enjoyment in possession in its ordinary sense, and which  
 "if denied can be enforced only by action or suit" (t).

The debts are not confined to debts presently payable, but debts which were only contingent at the commencement of the insolvency are not included (u).

Notice of assignment.

In the event of an assignment of debts due to the insolvent in the course of his trade or business of either a legal or equitable nature notice of the same must necessarily be given to the debtors to take the debt out of the operation of the reputed ownership clause (v), and the person to whom the debt is assigned must take every possible step to obtain possession of the debt (w). Although from absence of notice, consent of the true owner to the debt remaining in the order and disposition of the bankrupt is *prima facie* to be inferred such inference may be rebutted if the true owner take every possible step to obtain possession of the debt, or if the failure to obtain possession is not attributable to any fault of his own (x), and it appears it is not necessary that formal notice should be given to the debtor, it being sufficient if it be shown that the fact of assignment was communicated to him (y). The presentation of a Government H. order by the transferee to a clerk at the Treasury for payment was held not to be notice of the assignment (z). In such a case notice should apparently be given to the contracting department or to the Treasurer or to both (a). In addition to the steps referred to registration under the provisions of the *Book Debts Act* 1896 is also necessary for the class of debts therein dealt with, as that Act prescribes that no assignment or transfer of book debts due or to become due to any person whether absolute or conditional has any validity at law or in equity until such assignment or transfer has been registered by the Registrar-General in the manner prescribed by its pro-

Registration under Book Debts Act 1896.

(t) *Colonial Bank v. Whimey*, 11 Ap. Cas., 428, at p. 446.

(u) *Ex parte Kemp*, in re *Fastnedge*, L.R. 9 Ch., 383.

(v) *Rutter v. Everett*, (1895) 2 Ch., 872; vide also *Bartlett v. Bartlett*, 1 De. G. & J., 127, 140; and *Belcher v. Bellamy*, 2 Ex., 303.

(w) *Rutter v. Everett*, ante.

(x) *Ibid.*

(y) *Tibbitts v. George*, 5 A. & E., at p. 115; vide *Smith v. Smith*, 2 Cr. & M., 231; and *Ex parte Watkins*, 1 Mont. & Ayr., 689.

(z) *Board of Land and Works v. Ecroyd*, 2 V.L.R. (E.), 45.

(a) *Ibid.*



visions (b). This Act does not apply to debts owing in respect of any mortgage, lease, debenture, debenture stock, deposit receipt, judgment, bond, fire, or life assurance policy or contract for sale of real property, nor any debt for which a promissory note or acceptance has been given, nor to an assignment or transfer of book debts made by any person for the benefit of his creditors generally, but it applies to any debt due or to become due at some future time to any person on account of or in connection with any profession, trade or business carried on by such person whether entered in any book or not, and future debts of the same nature, although not incurred or owing at the time of the assignment or transfer (c).

The doctrine of reputed ownership has, since it was first enacted by 21 Jac. I. c. 19, s. 11, necessarily met with much judicial interpretation, and generally the exposition of Lord Redesdale (d) has been stated by other judges to be "the best exposition of the law" (e), and is as follows:—

The doctrine generally.

"The clause refers to chattels in the possession of the bankrupt, 'in his order and disposition with consent of the true owner;' that means where the possession order and disposition is in a person who is not the owner, to whom they do not properly belong, and who ought not to have them, but whom the owner permits, unconsciously as the Act supposes, to have such order and disposition. The object was to prevent deceit by a trader from the visible possession of a property to which he was not entitled; but in the construction of the Act the nature of the possession has always been considered, and the words have been construed to mean possession of the goods of another with the consent of the true owner."

The analogous sub-section of the *English Bankruptcy Act* 1883 (f) does not apply to Victoria, and therefore does not vest in the trustee under the English bankruptcy property in the possession, order or disposition of the insolvent in Victoria (g). In this case the bankrupt carried on business in London and Melbourne and elsewhere, and was adjudicated a bankrupt in England.

*English Bankruptcy Act* 1883, s. 44.

(b) *Book Debts Act* 1896, s. 3.

(c) *Ibid.*, ss. 2 and 14.

(d) *Joy v. Campbell*, 1 Sch. & Lef., at p. 336; 9 R.R., at p. 44.

(e) *Vide Colonial Bank v. Whinney*, 11 App. Cas., at p. 443.

(f) 46 & 47 Vict. c. 52, s. 44, sub-s. (iii.).

(g) *The Federal Bank of Australia Limited v. White*, 21 V.L.R., 451; 17 A.L.T., 189; 1 A.L.R., 145.

CHAP. V. 3. PROPERTY NOT DIVISIBLE AMONGST CREDITORS AND INCIDENTS  
THERETO.

The principal classes of property which are not divisible amongst the insolvent's creditors are as follows:—

Tools of trade,  
wearing apparel,  
and bedding.

The tools (if any) of the insolvent's trade and the necessary wearing apparel and bedding of himself, his wife, and children to a value *inclusive* of tools and apparel and bedding not exceeding £20 in the whole (*h*). The creditors may also by resolution at a general meeting direct that the whole or such part as they may think fit of the tools of trade, furniture, and wearing apparel of the insolvent, his wife, and children be granted to the insolvent (*i*).

Trust property.  
Express trusts  
not only  
excepted.

Property held by the insolvent in trust for any other person (*k*). The exception as to trust property is not limited to the case of *express* trusts only, and therefore if a person occupies the position of a fiduciary character property in his hands will not pass to the trustee on his insolvency, the owner having a right to follow his goods while in the hands of the agents, assignee, or trustee (*l*). Bills left for collection at a bankers on this principle would not pass to the trustee on the insolvency of the banker (*m*); bills discounted necessarily would (*n*). To preclude trust property from passing to the trustee it must be distinguishable, as in the case of money, if the person entrusted with it has mixed it with his own so that it cannot be distinguished and insolvency ensues, the only course left to the principal is to prove and rank as an ordinary creditor (*o*).

Specifically  
appropriated  
property.

Property specifically appropriated to a particular purpose before sequestration falls also within the exception of trust property. Where money is not given in itself for a particular purpose, but subject to the decision or approval of other persons, who fail to

(*h*) S. 70 (2), Act of 1890.

(*i*) *Ibid.*

(*k*) *Ibid.*

(*l*) *Vide Instruments Act* 1890, s. 221, and *vide Ex parte Cooke, re Strachan*, L.R. 4 Ch. D., 123. In the event of the agent pledging the goods or encumbering documents of title to the same with a lien, the owner can redeem and prove in the agent's insolvency as money paid for the use of the agent; *ibid. Instruments Act*, ante, s. 227.

(*m*) *Giles v. Perkins*, 9 East 12; *vide Ex parte Pease*, 19 Ves., 49.

(*n*) *Ex parte Sargeant*, in *re Burroughs*, 1 Rose, 153.

(*o*) *Taylor v. Plumer*, 3 M. & S. 562; 16 R.R., 361; *In re Hallett's Estate, Knatchbull v. Hallett*, 13 C.D., pp. 717-719; and *In re Farmer's Produce Co. of Australia Ltd., ex parte Bishop*, 20 V.L.R., 62; 15 A.L.T., 208; *Seeley v. Mercantile Bank*, 18 V.L.R., 485.

respond, the trustee on the insolvency of the donor is entitled to recover the amount from the person holding the same (*p*), and the trustee is also entitled to money paid to the insolvent for application in a specific manner when sequestration has occurred before steps have been taken towards the application of such, as the insolvent in such a case is merely a debtor (*q*). Property is more frequently specifically appropriated for the purpose of meeting bills of exchange, but what amounts to a specific appropriation or not is a matter of construction (*r*).

There is another and important branch of specific appropriation, which gives a right to the holder of an acceptance to securities deposited by the drawer with the acceptor to cover the indebtedness created by the acceptance. It arises only in the event of the respective estates of the drawer and acceptor becoming insolvent. This is known as *the rule of Ex parte Waring* (*s*). Observing upon it, Cotton, L.J., in *Ex parte Dever, in re Suse*, 14 Q.B.D., at p. 623, puts the principle of the rule thus:—"The Court finds certain "property in the hands of a bankrupt which has been remitted "to him by another person, also become bankrupt, to secure him "against a liability which he had undertaken upon bills drawn "on him by that person. The property cannot be applied in "paying the general creditors of the acceptor, because it was in "his hands impressed with a trust, nor can it go to pay the "general creditors of the drawer, because he was not entitled to "have it back without meeting the acceptances. The property is "applied in such a way as will carry out as far as possible the "equities between the two estates *i.e.*, in paying the acceptances "to cover which it was sent. The rule assumes that the property

The rule of *Ex parte Waring*.

(*p*) *Taylor v. Danby*, 2 A.L.R., 133.

(*q*) *In re Barned's Banking Company, ex parte Massey*, 39 L.J. Ch., 635; and *vide Farley v. Turner*, 5 W.R., 666.

(*r*) *Vide Rankin v. Alfaro*, 5 C.D., 786. In this case A. assigned consigned coffee to B., and drew bills upon him which he declined to accept. C. was the holder of some of these bills. A., finding that B. would not accept the bills, wrote to D. requesting him to realise the coffee, honour the bills, telegraph for a remittance if the proceeds would not cover the bills, and conduct the business so as to prevent A.'s reputation from suffering. The day before the due date of the bills held by C., D.

wrote to him a note specifying the bills and saying, "Take note that I expect "to receive early next week delivery "of the coffee sent by drawer against "the above, and that I will then again "write to you on the subject." Three days after this D. wrote to C., "Referring to my memorandum of the "14th instant, B. has handed me the "warrants for the coffee. I shall dispose of the same as instructed by "sender, and will let you have further "particulars in due time." The letters gave C. an equitable charge on the proceeds of the coffee.

(*s*) *Ex parte Waring*, 19 Ves., 345; 13 R.R., 217.

CHAP. V. "which is in the hands of the acceptor is not his own absolute property, if it was it would go to pay his creditors generally." As previously stated the rule is only applicable in the event of the estates of the drawer and acceptor being sequestrated, as it necessarily follows that if one only is insolvent the other must pay the holder, and the property appropriated would then pass to him. Another essential is the holder must have the right of double proof, that is a proof against both the estates of the drawer, and the acceptor (*t*).

Property of the Crown.

The Crown is not bound by the Acts (*u*), and therefore money lodged with the sheriff to procure a crown debtor's release from an arrest by the sheriff upon a warrant of *fieri capias* issued on a judgment for an estreated recognisance was unaffected by the insolvency of the debtor (*v*).

Personal rights of action.

The insolvent may continue in his own name, and for his own benefits any action commenced by him before sequestration for any personal injury or wrong done to himself or to any of his family (*w*). Personal wrongs within the meaning of this section are wrongs or injuries done to the reputation or person such as libel, slander or assault. These do not affect the estate in any way (*x*).

In cases of personal tort where the injury is of a personal nature to the insolvent or where the personal feelings of the insolvent are involved the right of action is the primary personal injury to the insolvent, that being the principal and essential cause of action (*y*). The principle extends to trespass to lands, whereby the plaintiff and his family are disturbed and annoyed, as in the case of breaking and entering the dwelling-house and garden of the plaintiff and damaging the doors of the house and trees of the garden and seizing his goods and exposing them for

(*t*) *Vide Vaughan v. Halliday*, L.R., 9 Ch., p. 561, distinguishing *Ex parte Smart, re Richardson*, L.R., 8 Ch., 220. Some of the principal cases in which this doctrine has been considered are *In re New Zealand Banking Corporation*, *Hickie's Case*, L.R., 4, Eq. 226; *Trimingham v. Maud*, L.R., 7 Eq. 201; *Royal Bank of Scotland v. Commercial Bank of Scotland*, L.R., 7 Ap. Cas., 366; *Ex parte Gomez, in re Yglesias*, L.R., 10 Ch., 639; *Ex parte Dewhurst, re Leg-*

*gatt, in re Gledstones*, L.R., 8 Ch., 965; *Ex parte Banner, re Tappenbach*, 2 C.D., 278; *Ex parte Dever, re Suse*, 14 Q.B.D., 611.

(*u*) *Reg. v. Griffiths*, 9 V.L.R. (L.), 45.

(*v*) *Ibid.*

(*w*) S. 79, Act of 1890.

(*x*) *Merry v. The Queen*, 13 V.L.R., at p. 267

(*y*) *Rogers v. Spence*, 13 M. & W., 571.

sale (z), and rights of action and damages arising from seizing and taking the plaintiff's goods under a false and unfounded claim for debt, whereby the plaintiff was annoyed and prejudiced (a), and to the right of action for the seduction of a man's daughter (b). The principle also extends to damages recovered in an action for tort by a bankrupt after sequestration and before his discharge (c). If the insolvent accumulates the money and invests it in some property the trustee would probably be able to reach it, but the fact that he could do that does not enable him to intercept the damages before they reach the insolvent's hands or to prevent him from spending them in the maintenance of himself and his family (d). Although the right of action for a personal injury pending at the time of sequestration does not pass to the assignee, yet when judgment has been recovered and the right of action turned into a debt before sequestration the debt will pass (e).

An action for breach of promise of marriage is strictly personal, and the cause of action is one which does not affect property (f), and apparently therefore it would not vest in the trustee. It is otherwise, however, where a sum is fixed by way of penalty or compensation for breach of contract, as in cases of wrongful dismissal (g).

Though the assignee or trustee on the insolvency of a tenant may put in an agent authorised by the Licensing Court to carry on the business (h), that right does not apply if the lease has been lawfully determined by the landlord, for on his taking lawful possession the licensee has no right to carry on the business, and his assignee or trustee in insolvency stands in no better position. A publican's licence is a personal one, the exercise of which is limited to particular specified premises (i).

The property and interest of any person to the extent of £1,000 in the whole in any policy or policies of assurance on his own life does not vest in the assignee or trustee unless the insolvency

Licensed  
victualler's  
license.

Life assurance  
under Com-  
panies Act 1890.

(z) *Ibid.*

(a) *Brewer v. Dew*, 11 M. & W., 625.

(b) *Howard v. Crowther*, 8 M. & W., 601.

(c) *Ex parte Vine*, in *re Wilson*, 8 Ch. D., p. 364.

(d) *Ibid.*

(e) *Solly v. Atkinson*, 5 V.L.R. (E.),

323.

(f) *Finlay v. Chirney*, 20 Q.B.D., 494.

(g) *Beckham v. Drake*, 2 H.L., 579; *Wadling v. Oliphant*, 1 Q.B.D., 145.

(h) S. 115, *Licensing Act 1890*.

(i) *Anthouess v. Anderson*, 14 V.L.R., pp. 142, 143.

CHAP. V. occurs within two years after the date of the policy (*k*), and "a voluntary settlement" by an assured of policies on his own life is to the extent stated valid against the creditors (*l*). The provision in the Act cited does not preclude a testator from directing that his debts shall be paid out of his life policies, and the sum mentioned or any part of it is not exempted from the operation of such direction (*m*). Where an uncertificated insolvent, who also had creditors for debts incurred after the sequestration, so directed, it is a question of intention, for which the whole of the will must be looked at to discover, and not a particular part of it only (*n*). A policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife or of his children or of his wife and children or any of them, or by any woman on her own life and expressed to be for the benefit of her husband or of her children or of her husband and children or any of them, creates a trust in favour of the objects therein named, and the moneys payable under any such policy do not so long as any object of the trust remains unperformed form part of the estate of the insured nor are they subject to his or her debts (*o*); but if it be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, the trustee is entitled to receive out of the moneys payable under the policy a sum equal to the premiums so paid (*p*).

Policies of assurance under *Married Women's Property Act 1890*.

Accommodation bills.

A mere accommodation bill in the hands of the original party to whom it is given does not pass to the trustee (*q*).

Electric lines and apparatus.

Electric lines, meters and apparatus relating to electricity belonging to the persons or undertakers authorised to supply electricity upon premises not belonging to such persons are not affected by the insolvency of the person in whose possession they are and thereupon do not pass to the trustee (*r*).

Goods stopped in transit.

Goods stopped in transit do not pass to the trustee, but he can complete the transaction as the contract, subject to the pro-

(*k*) *Companies Act 1890*, s. 369.

(*l*) *Davey v. Pein*, 10 V.L.R. (E.), 306; *Colonial Mutual Life Assurance Society v. Davey*, 11 V.L.R., 446.

(*m*) *Allen v. Edmonds*, 12 V.L.R., 789; *Campbell v. Stephen*, 13 V.L.R., 308.

(*n*) *The Trustees, Executors and Agency Company Limited v. Scott*, 2

A.L.R., 203.

(*o*) S. 14, *Married Women's Property Act 1890*. *Holt v. Everall*, 2 C.D., 266.

(*p*) S. 14, *ante*.

(*q*) *Clough v. Gray*, 1 W. & W. (E.), 225.

(*r*) *Electric Light and Power Act 1896*, s. 42.

visions hereinafter referred to, is not rescinded by the exercise of stoppage in transit. The provisions referred to are—(A) Where an unpaid seller who has exercised his right of lien or retention or stoppage *in transitu* re-sells the goods the buyer acquires a good title thereto as against the original buyer. (B) Where the goods are of a perishable nature or where the unpaid seller gives notice to the buyer of his intention to re-sell and the buyer does not within a reasonable time pay or tender the price the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract. (C) Where the seller expressly reserves a right of re-sale in case the buyer should make default and on the buyer making default re-sells the goods, the original contract of sale is thereby rescinded but without prejudice to any claim the seller may have for damages (s). The right of stoppage *in transitu* is exercised by the unpaid seller recovering possession of the goods when they are in course of transit and he may retain them until payment or tender of the price (t). The right arises when the buyer has become insolvent (u). A person is deemed by the Act dealing with stoppages *in transitu* (v) to be “insolvent” within its meaning who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of insolvency or not (w). And a seller of goods is deemed to be an “unpaid seller” within the meaning of the same Act (A) when the whole of the price has not been paid or tendered (B) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise (x), and the term “seller” includes any person who is in the position of seller, as for instance an agent of the seller to whom the bill of lading has been endorsed or a consignor or agent who has himself paid or is directly responsible for the price (y).

Stoppage in transit.

Meaning of “insolvent” within the Sale of Goods Act 1896.

Meaning of “unpaid seller.”

Meaning of seller.

Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water or other bailee or custodian for the purpose of transmission to the buyer until the

Duration of transit.

(s) *Sale of Goods Act 1896*, s. 52.

(t) *Ibid.*, s. 48.

(u) *Ibid.*, s. 44.

(v) *Sale of Goods Act 1896*.

(w) *Ibid.*, s. 3 (3).

(x) *Ibid.*, s. 43.

(y) *Ibid.*

**CHAP. V.** buyer or his agent in that behalf takes delivery of them from such carrier or other bailee or custodier (z). If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination the transit is at an end (a). The goods pass to the trustee when once delivery has been made, though the delivery may not take place until after the sequestration, as the sequestration is not of itself a countermand of the order, the trustee having the right to take possession of everything that may come into his hands (b).

Goods pass to trustee on delivery.

When transit is at an end.

If after the arrival of the goods at the appointed destination the carrier or other bailee or custodier acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee or custodier for the buyer or his agent the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer (c). If the goods are rejected by the buyer and the carrier or other bailee or custodier continues in possession of them the transit is not deemed to be at an end even if the seller has refused to receive them back (d). When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier or as agent to the buyer (d).

The delivery of the goods "free on board" does not in itself prove that the *transitus* is at an end (e). Where the carrier or other bailee or custodier wrongfully refuses to deliver the goods to the buyer or his agent in that behalf the transit is deemed to be at an end (f). Where part delivery of the goods has been made to the buyer or his agent in that behalf the remainder of the goods may be stopped *in transitu* unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods (g).

Manner of effecting the stoppage *in transitu*.

The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are, such notice may be given either to the

(z) *Sale of Goods Act* 1896, s. 49.

(a) *Ibid.*

(b) *Scott v. Pettit*, 3 Bos. & P., 469; 7 R.R., 804.

(c) *Sale of Goods Act* 1896, s. 49.

(d) *Ibid.*

(e) *Bernadson v. Strang*, L.R., 3 Ch., 588.

(f) *Sale of Goods Act* 1896, s. 49.

(g) *Ibid.*



person in actual possession of the goods or to his principal. In the latter case the notice to be effectual must be given at such time and under such circumstances that the principal by the exercise of reasonable diligence may communicate it to his servant or agent in time to prevent a delivery to the buyer (*h*). When notice of stoppage *in transitu* is given by the seller to the carrier or other bailee or custodier in possession of the goods he must re-deliver the goods to or according to the directions of the seller, who bears the expenses of such re-delivery (*i*).

If the carrier, after notice from the seller of the goods to stop them *in transitu*, by mistake delivers them to the buyer, the property does not pass but is re-vested in the seller, and if the buyer's estate has become sequestrated the goods are not in his order and disposition with the consent of the true owner (*k*).

Delivery by mistake.

Subject to the provisions of the *Sale of Goods Act* 1896, the unpaid seller's right of lien, retention or stoppage *in transitu* is not affected by any sale or other disposition of the goods which the buyer may have made unless the seller has assented thereto, but where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee (*l*).

Effect of sub-sale or pledge by buyer on the right of lien, retention or stoppage *in transitu*.

Money and things in action are excluded from the description of goods in the *Sale of Goods Act* 1896. The term "goods" being described (*m*) as including all chattels personal other than things in action and money, and includes emblements industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. When money is remitted by letter or packet, the same

Money and things in action in respect to stoppage *in transitu*.

(*h*) *Ibid.*, s. 50.

(*i*) *Ibid.*

(*k*) *Litt v. Cowley*, 7 Taunt., 169; 17 R.R., 482.

(*l*) *Sale of Goods Act* 1896, s. 51. See also *Instruments Act* 1890, ss. 229, 230.

(*m*) S. 3.

**CHAP. V.** cannot be returned to the sender without either the consent in writing of the person to whom the same is addressed, or by the direction of the Postmaster-General (*n*).

Goods subject  
to unpaid seller's  
lien.

Where a buyer of goods becomes insolvent, the unpaid seller who is in possession of them is entitled to retain possession of them until payment or tender of the price (*o*). They will not pass to the trustee unless he elects to complete the contract by payment of the agreed price within a reasonable time (*p*). If the trustee does not do so, the vendor is entitled to treat the contract as broken, and resell the goods without first tendering them to the trustee, and to prove on the estate for damages for breach of contract, the measure of the damages if the market is falling being the difference between the contract price and the price obtained in the resale (*q*). The unpaid seller may also in case of the insolvency of the buyer exercise the right of stopping the goods *in transitu* after he has parted with the possession of them as well as his right of resale (*r*). The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer (*s*).

As to part  
delivery.

Where an unpaid seller has made part delivery of the goods he may exercise his right of lien or retention on the remainder unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention (*t*).

Termination of  
lien.

The unpaid seller of goods loses his lien or right of retention thereon—(A) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods. (B) When the buyer or his agent lawfully obtains possession of the goods. (C) By waiver thereof. But the unpaid seller of goods having a lien or right of retention thereon does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods (*u*).

(*n*) *Post Office Act* 1890, s. 31. This provision does not apply to the cases expressly referred to in the Act cited, as the return of letters addressed to sweep and lottery promoters, fortune tellers, &c.

(*o*) *Sale of Goods Act* 1896, s. 45.

(*p*) *Ex parte Stapleton, in re Nathan*, 10 Ch. D., 586.

(*q*) *Ibid.*

(*r*) *Sale of Goods Act* 1896, s. 44.

(*s*) *Ibid.*, s. 45.

(*t*) *Ibid.*, s. 46.

(*u*) *Ibid.*, s. 47.

The Court may in its discretion order such portion of the pay, half-pay, salary, emolument or pension of an insolvent to be paid to the trustee to be applied in payment of the debts of such insolvent, and such order being lodged in the office of any officer or person appointed to pay or paying any such pay, half-pay, salary, emolument or pension, such portion of the said pay, half-pay, salary, emolument or pension as is specified in such order must be paid to the trustee until the Court otherwise orders (*v*). It has been stated that if the pension is given wholly for past services it passes to the trustee without an order (*w*).

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Pay, half-pay, salary or pension personal earnings of insolvent.

Appropriation of.

The assignee or trustee must give notice to the insolvent of his intention to apply to the Court for an appropriation (*x*). The notice must specify the time and place for hearing the application and that the insolvent is at liberty to show cause against such order being made. The form of notice is form No. 105, Appendix, *post*, with such variations as circumstances may require (*y*). Where the order is made the chief clerk must give to the applicant a sealed copy of the order, who must communicate the same to the chief of the department or other person under whom the pay, half-pay, salary, emolument or pension is enjoyed (*z*). The form of order is No. 106, Schedule of Forms, Appendix, *post*. Where an order has been made for the payment by an insolvent or by his employer for the time being of a portion of his income or salary, the insolvent may, upon his ceasing to receive a salary or income of the amount he received when the order was made, or upon the happening of any event affecting his financial position, apply to the Court to rescind the order or reduce the amount ordered to be paid, and the assignee or trustee (as the case may be) may upon the insolvent receiving a salary or income of an amount greater than that received by the insolvent when the order was made, or upon the happening of any event affecting the financial position of the insolvent, apply to the Court to increase the amount ordered to be paid by the insolvent (*a*).

Notice to insolvent.

Form of.

Communication of order to chief of department or other person.

Form of order.  
Review of order.

A purely voluntary allowance cannot be dealt with by the

Voluntary allowances.

(*v*) S. 99, Act of 1890.

(*w*) *Re Cockburn*, 6 A.L.T., 248, referring to *Caven v. Cooper*, 33 L.J. Ch., 289. In the opinion of Noel, J., s. 99 should be construed without reference to sections of a like import

but in different terms in the *English Bankruptcy Act (ibid)*.

(*x*) R. 94.

(*y*) *Ibid*.

(*z*) R. 95.

(*a*) R. 96.

## CHAP. V.

Earnings of  
professional  
men.

Court, as it cannot pass to the trustee (b), and the provisions of the section apparently cannot be applied to the prospective or contingent earnings of a professional man in the exercise of his own personal skill and knowledge as his "income" depends upon the amount of the work he does the result of such personal skill and knowledge (c), and further the words of the section do not appear to contemplate such earnings, but on the other hand the profits made by a bankrupt, *e.g.*, a surgeon dentist, after bankruptcy are not entitled to protection against the trustee though mainly due to the personal skill of the bankrupt if they are made and divided as profits of a business which the bankrupt has continued to carry on in partnership after his bankruptcy, the effect of which is that they lose their character of personal earnings (d).

Inalienable  
pensions.

In a case where the insolvent was formerly an officer in the Indian army and the pension, it appears from the report, was an Indian one and as such inalienable and by the Indian Code of Civil Procedure excepted from the property which vests in the receiver under an Indian insolvency, it was held under the analogous section of the *Bankruptcy Act* 1883 although the Court had jurisdiction to make an order for part payment of such a pension that as its effect would be to defeat the object of the Indian legislature it was wrongly made and must be set aside (e).

Wages.

The wages of a working collier have been held not to be salary, and an application to set aside a portion of the same was refused (f). The case quoted comes within the principle laid down in *Ex parte Benwell* (c), and such appears to be that although a bankrupt is in receipt of sums of money, yet inasmuch as he is not entitled to receive such sums with reference to a period computed by time but only in respect of the amount of the work done, the same are not salary or anything *ejusdem generis* with it. The case of the working collier falls within this, for if he works regularly he gets his wages and if he does not go

(b) *Vide Ex parte and in re Wicks*, 17 Ch. D., 70.

(c) *Vide Ex parte Benwell*, in *re Hulton*, 14 Q.B.D., 301.

(d) *In re Rogers, ex parte Collins*, 1 Manson, 387, (1894) 1 Q.B., 425; *vide*

also *Mercer v. Vans Colina*, 4 Manson, 363.

(e) *In re and ex parte Saunders*, (1895) 2 Q.B., 117.

(f) *In re Jones, ex parte Lloyd*, 8 Morrell, 210; (1891) 2 Q.B., 231.

to work he gets nothing (*g*). It has been said that whenever a sum of money has these four characteristics—first that it is paid for services rendered ; secondly, that it is paid under some contract or appointment ; thirdly, that it is computed by time ; and fourthly that it is payable at a fixed time—such is salary though it may not be a complete definition nor inclusive of every kind of salary (*h*). A commercial traveller in receipt of £100 a year in an engagement terminable at a week's notice is in receipt of a salary (*i*).

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Characteristics of salary.

The principle which underlies the making of the order is a question of amount and the bankrupt will only be allowed to retain such sum as is sufficient for the reasonable maintenance of himself and his family (*k*), and in order to entitle the Court to make the order the bankrupt must, it has been decided under 46 & 47 Vict. c. 52, s. 53, be in actual receipt of the salary (*l*). The Court ought not to cut down too closely a bankrupt's means of livelihood but should leave a liberal margin for his support (*m*).

Principle on which order is made.

The salary is not "property of the bankrupt," which vests in the trustee, and consequently until the order is made the debtor is competent to make any arrangement which he pleases in regard to such salary and the order when made cannot affect the validity of such an arrangement (*n*).

Arrangements prior to order.

The certificate of discharge, unless the payments are expressly ordered to be continued, terminates the order (*o*).

Cesser of order.

Where there is a fund out of which the payments are made to the bankrupt, the solicitor of the bankrupt has against the trustee a first charge for his costs of creating the fund, for example, his costs properly incurred in taking out and maintaining certain patents and carrying through the arrangements connected therewith (*p*).

Solicitor's lien on fund.

An interest in property may be settled by a person on another,

(*g*) *Vide ibid.*

(*h*) *In re Shine*, (1892) 1 Q.B., at p. 531.

(*i*) *Re Brindley*, 4 Morrell, 104.

(*k*) *In re Graydon*, *ex parte The Official Receiver*, (1896) 1 Q.B., 417.

(*l*) *In re Shine*, *ante*, at p. 522. In this case the bankrupt was an actor, and after a receiving order had been

made against him agreed that his employer should deduct the greater part of his salary in satisfaction of debts which the employer had bought up.

(*m*) *Ibid*, per Lord Esher, at p. 532.

(*n*) *Ibid*, at p. 522.

(*o*) *In re Gold*, 8 Morrell, 45.

(*p*) *In re Graydon*, *ante*.

CHAP. V. defeasible on the latter's insolvency, and the same would not pass to the trustee, the insolvency working a forfeiture (q). A settlement of damages recovered against a co-respondent upon trust for the wife for life whilst chaste and unmarried, and then for the husband for life with a gift over, in the event of his bankruptcy is good as against the trustee (r).

Interest in  
property  
determinable on  
insolvency.

Property may also be settled defeasible on insolvency, but with power to the trustees under the settlement to confer on the insolvent what they think fit from time to time in which case the trustee under the insolvency is excluded (s). Property cannot be settled on a person by himself so that his interest continues after bankruptcy (t), and an interest in property given to an uncertificated bankrupt contingently on his obtaining his certificate passes to the trustee on the happening of that event as a contingent interest then coming into possession (u). In this case a testatrix provided that in case her nephew who was an uncertificated bankrupt should obtain his certificate so as to be enabled to hold and enjoy real and personal estate for his own absolute personal use enjoyment and benefit free from the control of any other person, the income of the residue should be paid to him for life, on his subsequent discharge it was held that his life interest passed to his assignee in the manner stated. A settlement by a man of his own property cannot be made upon himself so as to defeat his creditors on insolvency as it is a fraud on the insolvency law (v), but he may covenant to pay back on his insolvency money received by him from his wife and belonging to her, if it is in the nature of a marriage agreement that he should have the use of it until his insolvency (w), and he can, on his marriage, create trusts of his own property to take effect on bankruptcy (x). The existence of a limitation over of the trust income to the

(q) *Ex parte Eyston*, in *re Throckmorton*, 7 C.D., 145. *Vide Shee v. Hale*, 13 Ves., 404; 9 R.R., 198; *Brandon v. Robinson*, 1 Rose, 197; 18 Ves., 429; 11 R.R., 226; *Re Machu*, 21 C.D., 838; *vide also* Davidson's *Precedents in Conveyancing*, 3rd ed., Vol. III., Part I., p. 109 *et seq.*; *In re Dugdale*, 38 C.D., 176.

(r) *In re Stephenson, ex parte Brown*, (1897), 1 Q.B., 638; 4 Manson, 13.

(s) Davidson, *ante* at pp. 130-1 thereof.

(t) *Brandon v. Robinson*, *ante*; *In re*

*Pearson, ex parte Stephens*, 3 C.D., 807.

(u) *Davidson v. Chalmers*, 33 L.J., Ch., 622.

(v) *Vide In re Detmold*, 40 C.D., at p. 587; *Higinbotham v. Holme*, 19 Ves., 88; 12 R.R., 146. *In re Ashby, ex parte Wreford*, (1892) 1 Q.B., 872.

(w) *Ex parte Hodgson*, 19 Ves., 206; 12 R.R., 171.

(x) Davidson, *ante*, at p. 138 thereof, referring to *re Meaghan*, 1 Sch. & Lef., 179; *Higginson v. Kelly*, 1 Ball & Bea., 252; *Lester v. Garland*, 5 Sim., 205.

settlor's children on his insolvency is evidence that the settlement is fraudulently contrived as against creditors, and in some cases as where the settlement amounts to all or almost all of the settlor's property he being then in debt or about to incur debts, it might be conclusive evidence of that fact, but generally it goes too far to say that the mere existence of the limitation should be conclusive (y).

CHAP. V.

The provisions of ss. 59 and 70, Act of 1890, limit the right of the trustee to property as defined by the Act, that is property to which the insolvent may become seised, possessed, or entitled, or which may be acquired by or devolve on him before he obtains his certificate, and therefore do not contemplate a bare possibility of inheritance or *spes successionis* passing to the trustee (z).

Hope of succession to property.

Money *bond fide* paid by a debtor to his solicitor to defray legal expenses in opposing proceedings in bankruptcy that have been commenced against him cannot should adjudication follow be recovered from the solicitor by the trustee, even although the solicitor knew of the acts of bankruptcy on which the proceedings were based (a). As the bankruptcy in England relates back to the act of bankruptcy and the sequestration here to the order *nisi*, money paid subsequent to the order *nisi* for the above purposes would apparently come within this decision.

Costs paid by debtor to oppose petition.

Prior to the commencement of a bankruptcy an agreement in writing was entered into by a client with his solicitor wherein a lump sum of money was paid by him to the latter, who was to provide for the client's defence on a charge of murder. Shortly after, but before the trial, the client became bankrupt. The money was duly applied, and the trustee's application to order the solicitor to repay the amount to the estate was refused. Under the agreement the solicitor could not demand more nor be accountable for any surplus (b). On the other hand two partners were arrested for forgery, and they paid over a sum of money to their solicitors under a verbal agreement to provide for their defence, and four days after became bankrupt. Though the money had all been duly applied to the bankrupts' defence the

Payment of lump sum to solicitors by agreement.

(y) *Rowe v. The Equity Trustees Executors and Agency Company Ltd.*, 21 V.L.R., at p. 771.

413.

(z) *Vide Jones v. Roe*, 3 T.R., 88; 1 R.R., 656; *Clowes v. Hilliard*, 4 C.D.,

(a) *In re Sinclair, ex parte Payne*, 15 Q.B.D., p. 616.

(b) *In re Charlwood*, 1 Manson, 42; (1894) 1 Q.B., 643.

CHAP. V. solicitors were ordered to repay the money (c). In this case it was found that the money was paid to the solicitors against charges to be incurred for professional services to be rendered, and that therefore the solicitors' authority was determined the moment the bankruptcy petition was filed, subject to the payment of costs up to that date (d); and though the trustee *prima facie* takes the whole estate free from any authority given by the bankrupt which has not already been executed, a solicitor may, when he has been authorised by the debtor to employ an accountant to examine his books and he has done so, and notwithstanding that he has had notice of an act of bankruptcy afterwards committed by the debtor, pay the accountant's fees out of money handed to him by the debtor before the bankruptcy to cover his charges (e).

Property under hiring and time payment agreements.

Under hiring contracts in which the property remains in the lessor the property does not pass until the whole of the price has been paid, unless they are in the order or disposition of the insolvent, which is generally rebutted by proof of custom (f). The hirer, however, it has been held, has an interest in the goods when they are lent for a term which the sheriff might sell under an execution (g). This being so, such an interest would pass to the trustee.

Money paid into Court by defendant.

Money paid into Court in an action on a promissory note by a defendant pursuant to an order giving leave to defend was held not to pass to the estate as at the date of the sequestration, judgment having previously been signed, the action was determined (h), and where the amount has been paid into Court by a defendant under the rules of the Supreme Court with a denial of the liability and he becomes bankrupt before the trial, the trustee declining to be made a party to the action, the plaintiff is a secured creditor to the extent to which his proof is admitted (i).

(c) *In re Beyts and Craig, ex parte Cooper*, 1 Manson, 56.

(d) *Vide also In re Pollitt, ex parte Minor*, 10 Morrell, 35; (1893) 1 Q.B., 455.

(e) *In re Whitlock, ex parte The Official Receiver*, 1 Manson, 33.

(f) *Per Malins, V.C. Crawcour v. Salter*, 18 C.D., at p. 50; *Wylie v. Nisbet*, 21 V.L.R., 7. *Vide also In re Peel, ex parte Crossley*, (1894) 1 Ir. R.,

235.

(g) *Dean v. Whittaker*, 1 C. & P., 347. *Vide also Wylie v. Nisbet, ante*; and see *In re Isaacson, ex parte Mason*, (1895) 1 Q.B., 333.

(h) *Goodman v. Strachan*, 2 A.J.R., 63.

(i) *In re Gordon, ex parte Navalchand*, (1897) 2 Q.B., 516; *vide also In re Keyworth, L.R. 9 Ch.*, 379; *In re Moojen*, 12 C.D., 26.



If the sum paid in exceeds the amount admitted on the proof, the plaintiff is a secured creditor only for the amount so admitted and the balance passes to the estate (*k*). Where money has been deposited by the defendant in lieu of bail and his estate has been sequestrated the money deposited passes to the estate (*l*).

Money paid into Court by the plaintiff as security for the defendant's costs in an action in which the defendant becomes bankrupt before the trial, belongs to the plaintiff subject to deduction of costs, if there be any, in respect of which the defendant on interlocutory proceedings may have obtained orders for costs in any event (*m*). By plaintiff.

#### 4. ACTIONS—EFFECT OF SEQUESTRATION ON SAME.

With the exception of actions for any personal injury or wrong done to himself or to any member of his family, which the insolvent may continue in his own name and for his own benefit, all actions (*n*) commenced by an insolvent before sequestration for any debt or demand, and all proceedings therein are upon the order of sequestration being made stayed until the assignee or trustee shall make election to prosecute or discontinue the same (*o*). Such election must be made within six weeks after notice served upon him by any defendant in any such action otherwise he is deemed to have abandoned the same (*p*). If the trustee elects not to continue an action it can be stayed and such stay is irremovable in the absence of special circumstances (*q*), and the insolvent is in the same position as his trustee if the former subsequently obtains his discharge, purchases the assets and desires to proceed with the action (*q*). The provision only stays those actions, with the above exceptions, commenced by the insolvent before sequestration. For a cause of action arising subsequently to the sequestration and before his discharge the insolvent may sue personally so long as the assignee does not interfere, as the relation existing between an uncertificated insol-

Actions by  
insolvent.

Causes of action  
arising after  
sequestration.

(k) *In re Gordon, ante.*

(l) *Warner v. Hall*, 1 V.L.T., 93.

(m) *In re Gordon*, ante, at p. 519.

(n) Issuing execution does not come within the meaning of "continuing an action"; *Solly v. Atkinson*, 5 V.L.R. (E.), p. 326.

(o) S. 79, Act of 1890—compare 5 Vict. No. 17, s. 33; 28 Vict. No. 273, s. 39; *vide also Merry v. The Queen*, 13 V.L.R., 264.

(p) *Ibid.*

(7) *Selig v. Lion*, (1891) 1 Q.B., 513.

CHAP. V. vent and the trustee is similar to that existing between agent and principal (*r*).

The provision does not apply to an appeal by an insolvent from an order for *certiorari* directed to a warden, and the same therefore is not stayed, as it is not an action or proceeding contemplated by the section. The word "action" must be construed strictly (*s*). Nor does it apply to suits in equity (*t*), but on the analogy of the section (79) and of s. 80, Act of 1890, the assignee was allowed six weeks' notice in the case of a sole plaintiff becoming insolvent to take up or discontinue the suit, the order being that if the assignee did not elect to proceed within six weeks from the service upon him the bill would be dismissed (*u*). In an earlier case it was decided that when a *suit* becomes defective by the insolvency of the plaintiff the defendant should apply to his assignee to elect whether he will continue the suit, or not, and where application was so made and the assignee did not reply the Court ordered the dismissal of the bill with costs if the assignee did not elect to continue within eight days after service upon him of the order (*v*).

Actions against insolvent.

No action can be brought against an insolvent for a debt provable in insolvency, and all proceedings in any action then pending are stayed upon an order of sequestration being made, and the plaintiff in such action may prove his debt together with the taxed costs of it then incurred against the insolvent estate, but any creditor who is prevented by the sequestration of the debtor's estate from proceeding to sell under an execution levied before the order of sequestration was made is entitled to be paid his taxed costs incurred in the action, suit or other proceeding under which such execution issued out of the proceeds of the insolvent estate, but no such payment can exceed fifty pounds, and all actions pending against any insolvent for damages alleged to have been sustained for any injury or wrong or breach of any contract committed by him (such damages being uncertain) or for recovery of any claim unliquidated as to its amount and all proceedings

(*r*) *Madden v. Hetherington*, 3 V.R. (L.), 68; *Fancy v. North Hurdfield, &c., Company*, 8 V.L.R. (M.), 5; *Buchan v. Hill*, W.N. (1888), 233.  
 (*s*) *Sims v. Demamiel*, 2 A.L.R., 51; 17 A.L.T., 241; 21 V.L.R., 634.  
 (*t*) *Willison v. Warburton*, 4 A.J.R.,

66; *vide infra*, as to actions against an insolvent.

(*u*) *Wood v. Gordon*, 6 V.L.R. (E.), 37.

(*v*) *Prigg v. Johnstone*, 5 V.L.R. (E.), 311.

therein are, upon any order being made for the sequestration of his estate, stayed and the plaintiff in such action after summoning the assignee or trustee to take up and defend the said action may proceed to obtain the judgment of the Court thereon, and the said judgment when recovered together with the taxed costs of suit is a debt provable against the said estate (*w*). CHAP. V.

No application is necessary to stay the action as the section operates of itself (*x*). Section operates of itself.

Evidence of the insolvency is necessary to be given, as where in proceedings before a Court of Petty Sessions, the debtor's estate being at that time in fact sequestrated, but no evidence of the same being given, it was held on an order to review that the magistrates were right in making an order in favour of the creditor on the materials before them. The decision of the magistrates in subsequently refusing an application for a rehearing might have been reviewed (*y*). Evidence of insolvency necessary.

A suit instituted by a writ claiming accounts against a defendant is not an action within the meaning of this provision, and is consequently not stayed by the insolvency of the defendant (*z*). In this case it was pointed out that the distinction between an "action" and "suit" is recognised by the section (*a*) itself, the first part of the section stating that proceedings in the action then pending, &c., and further on providing that any creditor who shall be prevented by sequestration from proceeding to a sale under an execution levied before sequestration shall be entitled to the costs incurred in the action, suit or proceeding, and that the fact that the section recognises the distinction between the two shows that the Legislature meant in the first part of the section to stay actions, but did not intend that suits should be stayed, though for obvious reasons if a suit had proceeded to judgment and execution against the property of a debtor it might be proper to stop the execution (*b*), and therefore an action which had been instituted for such relief as would, before the *Judicature Act* 1883, have been obtainable only by a suit in equity, is not an Suit for accounts.  
Distinction between action and suit.

(*w*) S. 77, Act of 1890—compare 5 Vict. No. 17, s. 31; 28 Vict. No. 273, s. 37.

(*z*) *Rose v. Byrne*, 9 A.L.T., 13; *McAuley v. Beatty*, 12 V.L.R., 633.

(*y*) *Stuart v. Phillips*, 17 A.L.T., 61.

(*c*) *Setter v. Bell*, 20 V.L.R., 244.

(*a*) S. 77.

(*b*) *Ibid*; vide also *The Australian Trust Company v. Webster*, 1 W. & W. (E.), 148, where it was held that the word action did not include suits. *England v. Moore*, 6 V.L.R. (E.), 48; *McCarthy v. Ryan*, 7 V.L.R. (E.), 136.

**CHAP. V.** action within the meaning of the section, and is not stayed by the insolvency of one of the defendants (c). It was suggested that since the *Judicature Act* came into force this has been altogether altered, but it was held that there was nothing in that Act or the rules under it to alter the meaning of the word "action" in a section of the Act which was in force when the *Judicature Act* came into operation, or when the rules came into operation; nor was there anything in the *Consolidated Acts* to suggest that the word action in this section now means anything different from what it meant in the *Insolvency Act* before the *Consolidated Acts* (z).

Effect of  
*Judicature Act*  
and *Consolidated*  
*Acts* on section.

Examination  
under *Supreme*  
*Court Rules*  
stayed.

Where a judgment debtor has become insolvent, the plaintiff cannot obtain an order for his examination under order 42, r. 32, of the *Supreme Court Rules* (*Judicature*) 1884 (d).

Insolvency of a  
joint defendant.

Appeal from  
Court of  
Insolvency not  
stayed.

Trustee of a  
deceased  
person's  
estate.

*Devastavit*.

In the case of the insolvency of a joint defendant after action commenced, the action may proceed against the other defendants (e), and so may an appeal under the provisions of the Acts which is not a proceeding in an action so as to be stayed by insolvency (f). In an action against an administratrix for a debt of a kind provable in insolvency if the intestate's estate be sequestrated while the action is pending, the action is permanently stayed by the first part of the section under notice, and it is wrong to have the trustee of the estate made a defendant under the latter part of the section, and any judgment obtained will be a nullity (g). In the same decision it is queried as to whether a claim for a *devastavit* could be joined in such action as that brought. If it could a judgment upon it based upon a judgment on the principal claim obtained as referred to would fall with such judgment (h). Where executors have committed *devastavit* and have subsequently sequestrated the testator's estate, the assignee or trustee may sue in respect thereof and recover the amount of such *devastavit* for the benefit of the creditors. Under the combined

(z) *Setter v. Bell*, 20 V.L.R., 244.

(c) *Kennedy v. Jones*, 2 A.L.R., 253.

(d) *Setter v. Bell*, 21 V.L.R., 333.

(e) *Ex parte Welsh*, 4 V.L.R. (L.), 52; vide also *Raynes v. Jones*, 9 M. & W., 104.

(f) *In re Portch*, 7 V.L.R. (1.), 126.

(g) *McAuley v. Beatty*, 12 V.L.R., 633. In this case it is stated that the 80th section has no reference to a case

of this kind, and that that section authorises the trustee by entering on the record a suggestion of the sequestration to continue or discontinue any action to which the insolvent is a party, and on entering a like suggestion to defend any action pending against the insolvent and affecting the insolvent estate.

(h) *Ibid*.

effect of ss. 35, 77 and 102, a creditor of the deceased would be CHAP. V.  
 "disabled to sue" the executors at law (i).

The provision (k) does not apply to the registration in the Supreme Court of foreign judgments (l), and consequently a certificate of judgment of the Supreme Court of another colony against defendants may be registered and should not be set aside on the ground that one of the defendants had prior to the registration become insolvent in Victoria (m), but an action cannot be brought against an uncertificated insolvent of New South Wales in Victoria on judgments obtained against him prior to insolvency there, as according to the law of the country where the insolvency took place, and which was the *forum* of the obligation, no action could be brought against him, although by such law the insolvent is not discharged from the debt until he obtains his certificate (n).

The costs of the execution creditor not exceeding fifty pounds are payable out of the estate, and when taxed are paid by the trustee under s. 123 (1), Act of 1890.

Where a judgment or process is for the sum of fifty pounds or upwards no sale of any property can take place by a sheriff or any County Court bailiff until after eight days from the seizure or attachment thereof, and if such property be sold the sheriff or bailiff must retain the proceeds for four days after the sale and if a sequestration of the debtor's estate be made within such time the sheriff or bailiff must hand over such proceeds to the assignee or trustee to be dealt with by him as part of the insolvent estate (o). This direction does not apply where the execution is against a firm for a partnership debt and the insolvency of one of the partners takes place in the time specified (p). The proceeds of the sale are the property of the execution creditor, subject only to a particular defeasance and where the time with-

(i) *Hasker v. McMillan*, 5 V.L.R. (E.), 217, 221. See as to similar provisions in former Acts, *McClelland v. Smith*, 1 V.L.T., 150.

(k) S. 77, Act of 1890.

(l) *Vide* ss. 4 and 5, *Australasian Judgments Act 1886*.

(m) *McArdell v. McMeckan*, 18 A.L.T., 154; 3 A.L.R., 39.

(n) *Spalding v. Bailey*, 17 V.L.R., 478.

(o) S. 76, Act of 1890—compare 32 & 33 Vict. c. 71, s. 37.

(p) *Vide Dobb v. Brooke* (1894), 2 Q.B., 338, where the passage in Lindley, 6th ed., p. 692:—"It will also be 'probably held to apply where one 'partner is bankrupt and the execution 'is against the firm for a partnership 'debt,' is explained by Vaughan Williams, J.

As to foreign judgments and insolvents.

Costs of execution creditor under the section.

Effect of the order of sequestration upon judgments and executions.

CHAP. V. in which the defeasance could effectively take place has expired the proceeds become absolutely the property of the execution creditor (*q*).

If no sequestration takes place the sheriff or bailiff must pay the proceeds to the judgment creditor (*r*). The sequestration also stays further execution of any judgment or process against the person or property of an insolvent, and the person having right to such judgment may prove his debt against the insolvent estate, and where any property has been seized or attached by legal process and has not been sold, such property is placed under sequestration in the same manner as any other part of the insolvent estate (*s*), and where the judgment debtor has become insolvent, pending the disposal of and before interpleader proceedings have been concluded, the execution creditor is stayed and in such a case the execution creditor will not be ordered to pay the sheriff's costs of the interpleader proceedings (*t*).

Foreign attachment stayed.

The procedure of foreign attachment is within s. 76, and where an action was commenced against two joint debtors a writ of foreign attachment was issued, and an order made attaching property of E., one of the defendants and a verdict was found for the plaintiffs, but before judgment was signed, E. became insolvent. A suggestion in accordance with s. 212 of the *Common Law Procedure Statute* 1865 (*u*) was subsequently entered upon the roll and judgment signed. On the application of the assignee, the entry of the suggestion and signing of judgment were set aside, as the property attached passed on the insolvency to the assignee (*v*), and there is no distinction in the operation of the section created by the fact that the writ of foreign attachment is followed by a judgment, and the assignee is entitled to possession of the goods attached free from any charge in favour of the plaintiff for the benefit of all the creditors (*w*).

Distinction between sequestration and winding up order under section.

A "winding up order" is not a "sequestration" within this section, and therefore where a writ of *fieri facias* was executed by

(*q*) *Vide* *Watkins v. Barnard*, (1897) 2 Q.B., at p. 526.  
 (*r*) S. 76, *ante*.  
 (*s*) *Ibid*—compare 5 Vict. No. 17, s. 30; 26 Vict. No. 273, s. 36.  
 (*t*) *Hintze v. Hintze*, 20 A.L.T., 215; following *Martin v. Nicholls*, 12 A.L.T., 190, and *Union Bank v. Jarrett*,

14 A.L.T., 238.

(*u*) Now s. 92, *Supreme Court Act* 1890.

(*v*) *Lauratet v. McCracken*, 3 V.R. (L.), 41; *vide* also *McEwan v. Thompson*, "Argus," 5th April, 1860.

(*w*) *Thomson v. Schaefer*, 18 V.L.R., 404; 14 A.L.T., 31.

seizure and sale against an incorporated mining company, and three days after a "winding up" order was made, it was held that the execution creditor was entitled to the proceeds of the sale (x). CHAP. V.

Where the estate of the insolvent had been sequestrated in New South Wales, but creditors in Victoria previous to such order had seized under execution on judgments obtained in Victoria, it was held that the sequestration did not divest the title of the execution creditors in Victoria notwithstanding the fact that the order for sequestration by the law of New South Wales had relation back to a period antecedent to the seizure (y). Where the sequestration is a foreign one.

The Court has jurisdiction to order the papers deposited by the bankrupt with his attorney in actions commenced before the sequestration to be delivered up to the trustee if they are necessary to the administration of the estate, but where such papers were required for the purpose of instituting criminal proceedings against the bankrupt the order to produce was refused (z). Right to papers in action commenced before insolvency.

The portion of the section relating to process against the person, and the provisions as to the effect of the order of sequestration on the insolvent in custody under legal process are dealt with in Chapter VI., *post*. Process against the person.

### DIVISION 3.

#### PROOFS OF DEBT.

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|--|---|
| <p>1. Mode of Proof and Trustee's Duties as to Proofs.</p> <p>2. Admission, Rejection, Expunction, and Reduction of Proofs by Court.</p> | <p>3. Various kinds of Proofs.</p> <p>4. Mutual Dealings and Set-off.</p> |
|--|---|

#### 1. MODE OF PROOF AND TRUSTEE'S DUTIES AS TO PROOFS.

Every creditor must prove his debt as soon as may be after the making of the order of sequestration (a), and all debts Mode of proof.

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|--|--|
| <p>(x) <i>The Oriental Bank Corporation v. The Wattle Gully United G.M. Company</i>, 1 V.L.R. (L.), 28.</p> <p>(y) <i>The Union Bank v. Tuttle, D'Alba v. Tuttle</i>, 15 V.L.R., 258; contrast the</p> | <p>judgment in <i>Spalding v. Bailey</i>, 17 V.L.R., 478.</p> <p>(z) <i>Ex parte Innes, re Scott, Buck</i>, p. 337.</p> <p>(a) R. 204.</p> |
|--|--|

**CHAP. V.** provable in insolvency may be proved and every creditor of the insolvent and any one or more of several joint creditors may after sequestration prove his or their debt by delivering or sending through the general post to the assignee or trustee as the case may be an affidavit or declaration by the creditor containing a full, true and complete statement of account between the creditor and the insolvent and that the debt thereby appearing to be due from the estate of the insolvent to the creditor is justly due (*b*). Proof is then complete assuming that the rules have also been complied with (*c*). By r. 205, a creditor may also prove his debt at any duly summoned meeting of creditors or at any time before the meeting by delivering or sending through the post in a prepaid letter, before the appointment of trustee to the assignee, and after the appointment of a trustee to such trustee an affidavit verifying the debt.

Proof at meeting of creditors or before.

As to time of proving.

As to time on absence or disability of creditor.

Any debt provable in insolvency may be proved at any time before the final distribution of the estate (*d*), and the discharge of the insolvent does not affect the proof of a debt if there is a fund still distributable (*e*). And when by reason of the absence of any person from Victoria or for any other cause the Court be of opinion that a claimant who has not proved his debt may eventually be able to establish the same the Court may allow such claim to be entered in the proceedings in the insolvent estate and may give reasonable time for proving the same and in the meantime may make such order for securing the amount thereof in case the claim be afterwards established as the Court thinks fit (*f*).

Form and contents of affidavit.

Declaration.

The affidavit of proof must be in the form No. 75, Appendix, *post*, with such variations as circumstances may require, and must contain an address of the creditor or his solicitor at which notices may be served, and service of notices at such address, except otherwise provided by the rules, is sufficient (*g*). Proof can be made by declaration as well as by affidavit, and may be lawfully sworn or declared (*h*). The affidavit must state whether the creditor is or is not a secured creditor (*i*), and it must contain or

(*b*) S. 106, Act of 1890.  
 (*c*) *In re Keogh*, 7 A.L.T., 79, 80.  
 (*d*) S. 112, Act of 1890. *Vide In re Georgeason*, 1 A.J.R., 114, 139.  
 (*e*) *Re Brown, Stansfeld & Co.*, 3

A.J.R., 19.  
 (*f*) S. 111, Act of 1890.  
 (*g*) R. 206.  
 (*h*) S. 106, *ante*.  
 (*i*) R. 210.



refer to a statement of accounts showing the particulars of the debt and must specify the vouchers (if any) by which the same can be substantiated (*l*). The trustee may at any time call for production of the vouchers (*m*). CHAP. V.

As to the taking of affidavits, *vide* p. 35, *ante*. The proof cannot be sworn before the solicitor or clerk of the solicitor of the deponent (*n*). Before whom sworn.

The affidavit may be made by the creditor himself or by some person authorised by or on behalf of the creditor (*o*). If made by a person so authorised it must state his authority and means of knowledge (*p*). In the case of a corporation the agent should be duly authorised under its seal (*q*). The deponent.

A proof intended to be used at the general meeting of creditors to be held under s. 53, Act of 1890, must be lodged with the assignee not later than twenty-four hours before the time fixed for holding such meeting (*r*), and a proof intended to be used at an adjournment of the first meeting (if not lodged in time for the first meeting) must be lodged not less than twenty-four hours before the time fixed for holding the adjourned meeting (*s*). Time for lodging proofs.

Where a trustee is appointed in any matter all proofs of debt that have been received by the assignee must be handed over to the trustee, but the assignee must first make a list of such proofs and take a receipt thereon from the trustee for such proofs (*t*). Transmission of proofs to trustee.

The creditor proving must deduct therefrom all trade discounts excepting any such discount which he may have agreed to allow for payment in cash (*u*). Deduction of trade discounts.

On any debt or sum certain, payable at a certain time or otherwise, whereupon interest is not reserved or agreed for, and which is overdue at the date of the order of sequestration and provable in insolvency, the creditor may prove for interest at a rate not exceeding six pounds per centum per annum to the date of the said order from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at Interest on debt in proof.

- (*l*) R. 209.
- (*m*) *Ibid*.
- (*n*) R. 211.
- (*o*) R. 207 ; s. 21, Act of 1890.
- (*p*) R. 207.

- (*q*) R. 208.
- (*r*) R. 227.
- (*s*) R. 228.
- (*t*) R. 229.
- (*u*) R. 214.

## CHAP. V.

a certain time, or if payable otherwise, then from the time when a demand, in writing, has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment (*v*).

Debts not payable at sequestration may be proved.

By r. 240 a creditor may prove for a debt not payable at the date of sequestration as if it were payable presently, and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of six pounds per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted (*w*).

Trustee's duty as to proofs and as to admission or rejection of same.

The trustee must examine all the affidavits and declarations of proof and the grounds of the debt and compare the same with the books, accounts, and other documents of the insolvent (*x*), and subject to the power of the Court to extend the time he must within twenty-eight days after receiving a proof, in writing either admit or reject it wholly or in part, or require further evidence in support thereof (*y*). In the case where the trustee has given notice of his intention to declare a dividend he must, within seven days after the day mentioned in such notice as the latest date up to which proofs must be lodged, examine and, in writing, admit or reject every proof which has not been already admitted or rejected (*z*). In the event of a proof being rejected it may be withdrawn if the rejection is on a matter of form or if the proof has not been adjudicated on (*a*).

Notice of rejection.

If the trustee rejects a proof he must state in writing to the creditor the grounds of the rejection (*b*).

Notice of admission.

Where a creditor's proof has been admitted the notice of

(*v*) R. 239.

(*w*) As to this rule compare *Bankruptcy Act* 1883, 2nd sch. (21); and *vide Re Browne, ex parte Ador*, (1891) 2 Q.B., 574, as to effect of that Act and this rule being that the creditor may prove for interest accruing after the date of the receiving order. According to such case the proper course is to prove the principal sum as a present debt and then under the rule cited to deduct a rebate of interest at the rate mentioned from the dividends upon it, and then to value the liability

to pay interest and prove for that value, the dividend on which is to be paid without any rebate. Further, if the rate of interest contracted for is the rate mentioned in the rule, the proper course is simply to prove for the principal sum as a present debt without any rebate.

(*x*) S. 108, Act of 1890; r. 230.

(*y*) R. 230.

(*z*) *Ibid*.

(*a*) *Re Deerpur, ex parte Seaton*, 8 Morrell, 258.

(*b*) R. 230.

dividend is sufficient notification to such creditor of its admission (c). CHAP. V.

If a creditor is dissatisfied with the decision of the trustee in respect of a proof, the Court may on the application of the creditor reverse or vary the decision (d), and it is provided by r. 237 that whenever the trustee rejects the claim or proof of the creditor, he is entitled to exclude from dividend any such claimant or creditor whose debt he so rejects, unless the creditor within fourteen days from the time at which the trustee's notice rejecting the claim or proof should have been delivered to him in the ordinary course of post, or within such further time as the Court may allow, applies to the Court to admit his proof and proceeds with such application with due diligence. A somewhat similar rule of 1890 was held to be *ultra vires* so far as it limited the time (e). The operative law is contained in s. 109, Act of 1890, in which the time is unrestricted as to when the Court may admit, reject, expunge, or reduce a proof. Where any creditor after the date mentioned in the notice of intention to declare a dividend (f) as the latest date upon which proofs may be lodged, appeals against the decision of the trustee rejecting a proof, such appeal, subject to the power of the Court to extend the time in special cases, is commenced, and notice thereof must be given to the trustee within fourteen days from the date of the notice of the decision against which the appeal is made, and the trustee must in such case make provision for the dividend upon such proof, and the probable costs of such appeal in the event of the proof being admitted, and where no appeal has been commenced within the time lastly specified the trustee must exclude all proofs which have been rejected from participation in the dividend (g).

Appeal from trustee's decision.

The trustee must within seven days after allowing or dis-allowing a proof file the same with the chief clerk with a memorandum thereon of his allowance or disallowance thereof (h). If the trustee omits to file a proof as admitted or rejected and does nothing with the proof but keeps it, the creditor is not

Filing of proofs.

(c) R. 231.

(d) R. 234.

(e) *Re Merry*, 10 A.L.T., 125.

(f) *Vide* Part 4 of this chapter,

*post*, as to dividends.

(g) R. 241 (2).

(h) R. 232.

**CHAP. V.** affected (*i*). For the purpose of any of his duties in relation to proofs the trustee may administer oaths and take affidavits (*k*).

Trustee may administer oaths in relation to proofs.

Trustee's list of proved creditors.

It is the duty of the trustee from time to time to make out a list of creditors who have proved, stating the amount and nature of their debts, and such list must be open to the inspection of any creditor who has proved (*l*).

Inspection of proofs by creditors.

Costs of proof.

Every creditor who has lodged a proof is entitled to see and examine the proofs of other creditors before the first general meeting of creditors under s. 53, Act of 1890, and at all reasonable times (*m*). Unless the Court otherwise specially orders a creditor must bear the cost of proving his debt (*n*).

## 2.—ADMISSION, REJECTION, EXPUNCTION AND REDUCTION OF PROOFS BY COURT.

The Court may at any time admit, reject, expunge or reduce a proof of debt on the application of any creditor or of the trustee or of the insolvent (*o*). The insolvent, however desperate and hopeless his prospects may be, is entitled to oppose a proof (*p*).

Affidavit where notice given before or at a meeting.

Application by motion.

Power of Court to grant short notice.

If the notice is given before or at any meeting for the election of a trustee it is necessary to serve an affidavit of the applicant and a solicitor stating that such application is *bond fide*, and not to prevent the person claiming to be a creditor from voting at the meeting (*q*). The fact that the applicant is a solicitor does not prevent the application of this rule (*r*). The application is by way of motion, and the same may be set down for hearing after the expiration of fourteen days from the filing and serving on the respondent of the notice of motion (*s*). Notice of the day of hearing must be contained in such notice of motion (*t*). The Court may, upon application *ex parte* direct that the hearing take place at an earlier date and give leave to serve short notice of hearing upon such terms and in such manner as it thinks fit (*u*).

Where the notice of motion has been filed and it is desired by any party thereto to make an application in it, two days' notice

(*i*) *In re Farrell*, 4 A.J.R., 101.

(*k*) S. 85 (1), Act of 1890; r. 236.

(*l*) S. 108, Act of 1890.

(*m*) R. 213.

(*n*) R. 212.

(*o*) S. 109, Act of 1890. *Vide also* rr. 233, 235.

(*p*) *Ex parte Usher, re Colonial Bank of Australasia*, 2 V.R. (I.), 3, 6.

(*q*) R. 47.

(*r*) *In re Pounds*, 12 A.L.T., 167.

(*s*) R. 33.

(*t*) *Ibid.*

(*u*) *Ibid.*

must be given unless the Court otherwise orders, and all answering affidavits must be filed and served at least one day before the hearing of the application (v).

CHAP. V.

Time for application in motion.

The notice of motion must contain an address of the applicant or of some solicitor at which notice of defence may be served and service thereat is deemed good service on the applicant (w), and it must also contain the name of the person against whom such application is made, and all grounds intended to be relied on and all necessary particulars (x). The notice must bear an endorsement intimating the necessity of opposing same (y). In a matter where the endorsement was omitted, and the applicant at the hearing objected that the trustee (the respondent), could not be heard, as he had given no notice of opposition, the objection was allowed, and an order made in favour of the applicant. On appeal it was held that if the objection to the notice had been merely as to its form the judge might have heard the case, but the applicant was in the wrong in omitting to intimate the necessity of a notice to oppose and that the judge should not have proceeded *ex parte*, and the decision was reversed without prejudice to a new application (z). The notice must also bear the endorsement in the case of an insolvent seeking to reduce a proof by a set-off (a).

Requirements of notice.

The notice of defence must be served on the applicant at the address given in the notice of motion seven days before the time fixed for hearing, and it must contain all grounds of legal or equitable defence intended to be relied on and the address of the defendant or his solicitor (b).

Notice of defence.

Service at the address in such notice of defence is deemed sufficient (c).

Service on respondent.

The party supporting the proof is deemed the plaintiff (d), and a creditor therefore in an application by an insolvent to expunge a proof has the right to commence (e). The proof must be put in

The parties.

(v) *Ibid.*

(w) R. 34; by r. 28, personal service is effected by delivering to each party to be served a copy of the notice of motion.

(x) R. 35.

(y) R. 36; *vide* form 117, Appendix, *post*.

(z) *Re Acock, ex parte Dixon*, 2 V.R. (I.), 45.

(a) *Vide re Hickinbotham*, 5 V.L.R. (I.), 101.

(b) R. 38.

(c) *Ibid.*

(d) R. 39.

(e) *Vide Re Munro*, 16 V.L.R., 670.

**CHAP. V.** evidence, as it is the foundation of the proceeding (*f*). The party opposing the proof is the defendant (*g*).

Amendment of motion or defence.

Either party with the leave of the Court may amend or add to his notice upon such terms as to adjournment, security, costs or otherwise as the Court may think fit (*h*).

Order for particulars.

Either party may apply for an order for particulars, and the Court may order the same upon the like terms as in the case of amendment (*i*).

The hearing.

The motion is heard upon evidence *viva voce* in the same manner as nearly as may be as a civil trial in the Supreme Court, unless both parties consent that the same be heard upon affidavit (*k*), and all rules now in force in the Supreme Court with reference to trials in civil proceedings, so far as the same are applicable, regulate inquiries in the matter (*l*). The affirmative is on the plaintiff, unless in the case of a proof which has been already admitted by the Court after opposition, in which case the defendant must satisfy the Court that the proof ought to be expunged (*m*). Where the notice is based on two or more grounds the applicant must in his case in chief give evidence in support of all his grounds, otherwise the grounds upon which no evidence is given are deemed to be abandoned (*n*).

Power of Court on notice not being served on all proper parties.

On the hearing of the motion if the Court is of opinion that any person to whom notice has not been given should have had notice it may either dismiss the motion or adjourn the hearing thereof in order that the same may be given upon such terms as the Court thinks fit (*o*).

Filing affidavits.

Unless the time is otherwise specially prescribed affidavits in support or in opposition must be filed with the chief clerk not later than two days before the day appointed for the hearing (*p*).

Filing of copy notice of motion.

The party intending to move must, previous to the public sitting of the Court, deliver to the chief clerk a copy of the notice of motion, and there must be endorsed on such copy the name of the applicant or the name and place of business of the applicant's

(*f*) *Vide Re Munro, ante.*

(*g*) R. 39.

(*h*) R. 39. *Vide also ante, at p. 45, as to amendment.*

(*i*) R. 40.

(*k*) Rr. 41, 45.

(*l*) R. 46.

(*m*) R. 42.

(*n*) R. 43.

(*o*) R. 26.

(*p*) R. 29.

solicitor (if any), and also the name of the respondent, or, if known, the name and place of business of the respondent's solicitor (if any) (q). CHAP. V.

The party moving the Court has the carriage of the order, whether in his favour or not, but if the same is not procured and served within seven days next following, the carriage thereof is on the other party (r). The person who has the carriage of the order must obtain from the chief clerk an appointment to settle the order, and must give reasonable notice of the appointment to all persons who may be affected by the order or their solicitors (s). Carriage of order.  
Settling of order.

### 3.—VARIOUS KINDS OF PROOFS.

A debt provable in insolvency means any debt or liability or claim made provable by the Acts against the insolvent estate (v). It may not be in the ordinary sense a debt, as for example the contingent debt of an uncalled liability on shares in a registered company (w). Meaning of debt provable in insolvency.

All debts and liabilities present or future, certain or contingent, to which the insolvent is subject at the date of the order of sequestration or to which he may become subject before he obtains his certificate by reason of any obligation incurred previously to date of the order of sequestration are deemed to be debts provable in insolvency and may be proved in the manner dealt with, excepting demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise (x). Every possible demand, every possible claim, every possible liability, except for personal torts, can be the subject of proof (y), and for the purposes of the Acts "*Liability*" includes any compensation for work or labor done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement or undertaking, whether such breach does or does not occur or is or is not likely to occur or capable of occurring before the grant of a certificate to the insolvent and generally it includes any express or implied Debts provable.  
Meaning of "*Liability*."

(q) R. 30.

(r) R. 32.

(s) *Ibid.*

(v) S. 4, Act of 1890—compare definition in s. 4 of 32 & 33 Vict. c. 71. S. 1, Act of 1897.

(w) *Vide In re The Melbourne Loco-*

*motive and Engineering Works, Neave's case*, 21 V.L.R., 442.

(x) S. 114.

(y) *Per James, L.J., Ex parte Llynvi Coal and Iron Co., in re Hide*, L.R., 7 Ch., 28.

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engagement, agreement or undertaking to pay or capable of resulting in payment of money or money's worth, whether such payment be as respects amount fixed or unliquidated; as respects time present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules or assessable only by a jury or as a matter of opinion (z). The object of this enactment is to relieve the insolvent from every description of liability (a). There are, however, some liabilities from which he is not relieved by insolvency, as a debt or liability incurred by means of fraud or fraudulent breach of trust to which he was a party; or a debt or liability whereof he has obtained forbearance by any fraud to which he was a party; or liability under a judgment for seduction or under an affiliation or maintenance order or under a judgment or order against him as a respondent or co-respondent in a matrimonial cause, except to such extent and under such conditions as the Court expressly orders in respect of such liability (b), or the debt of an insolvent assignee or trustee to an estate of which he was assignee or trustee in respect of any sum of money improperly retained or employed by him (c).

*Bond Ades of debt.*

The debt provable in insolvency must necessarily be a real one, so, where a registered company sought to prove against the estate of the insolvent but the facts showed that the company was nothing more than a dummy for the insolvent and, though registered, never had any real valid existence apart from the insolvent himself, the proof was rejected (d). With the exception of the preferential debts hereinafter set out all debts provable under the insolvency are paid *pari passu* (e), and this includes also voluntary debts such as those arising on voluntary bonds or covenants of the insolvent (f), but it does not include contracts or agreements, whether by parol or in writing, by way of gaming or wagering, which are null and void (g), but when an illegal game is unfinished and the money not paid over either party may recover the stakes deposited by him (h) and consequently may prove against the estate of the stake-holder.

Voluntary debts.

Wagering.

Stake-holder.

(z) S. 114.

(a) *Vide Ex parte Llynvi Coal Co., in re Hyde*, L.R., 7 Ch. Ap., 28.

(b) S. 96, Act of 1897.

(c) S. 151, Act of 1890.

(d) *In re Yencken*, 15 A.L.T., p. 114.

(e) S. 115, Act of 1890.

(f) *Ex parte Pottinger, in re Stewart*, 8 Ch. D., 621.

(g) *Police Offences Act 1890*, s. 72.

(h) *Melville v. Pendreigh*, 5 A.J.R., 84.



An annuitant can prove for the value of future payments of the annuity (*i*). If a surety for such becomes bankrupt before default by the grantor proof cannot be made against his estate (*k*). The surety can prove on the grantor's estate for payments of arrears made by him (*l*).

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Annuity and sureties as to annuities.

Proof cannot be made for a debt arising out of a felonious act until the injured party has prosecuted the felon (*m*). The rule is stated to be subject to the exceptions as follows:—(A) where the offender has been brought to justice by some other person injured by a similar offence; (B) when prosecution is impossible by reason of the death of the offender; (C) where he has escaped from the jurisdiction before a prosecution could have been commenced by the exercise of reasonable diligence. The obligation to prosecute does not extend to the injured person's trustee in bankruptcy (*n*).

Proof in case of felony.

All bodies politic and incorporated companies may prove by an agent, provided such agent in his affidavit or declaration states that he is such agent and that he is authorised to make such proof, and such affidavit or declaration must be in such form as is directed by the rules (*o*). In a case where a limited company proved on the estate of one of its debtors and received from time to time dividends in respect of its proof, but before the final dividend the company was wound up and dissolved by order of the Court, it was held that the Crown was entitled to the final dividend to which the company would have been entitled if in existence as *bona vacantia* (*p*).

Bodies politic and incorporated companies.

An infant to whom a debt is due has the same rights as any other person (*q*), and there is nothing restrictive in the Acts, "every" creditor being permitted to prove (*r*). See further as to infants, "Compulsory Sequestrations," Chapter IV., at p. 88.

By infants.

The Master-in-Lunacy may sue and do all acts with reference

By lunatics.

(*i*) *Ex parte and in re Blakemore*, 5 C.D., 372; *vide also Ex parte Annandale, re Curtis*, 4 Dea. & Ch., 511; 2 Mont. & A., 19.

(*k*) *Ex parte Thompson, re Wyatt*, 2 Dea. & Ch., 126.

(*l*) *Welsh v. Welsh*, 4 M. & S., 333.

(*m*) *Ex parte Elliott, in re Jermyn*, 3 Mont. & A., 110; *vide Stone v. Marsh*, 6 B. & C., 551; *Ex parte Ball, re Shepherd*, 10 C.D., at p. 674, *Per Bag-*

gally, L.J.

(*n*) *Ex parte Ball*, *ante*, at p. 667.

(*o*) S. 106; *vide form 75*, Schedule of Forms.

(*p*) *Re Higginson and Dean, ex parte Attorney-General*, (1899) 1 Q.B., 325; 5 Manson, 289.

(*q*) *In re and ex parte Brocklebank*, 6 C.D., 358.

(*r*) S. 106, Act of 1890.

<b>CHAP. V.</b>	<p>to estates committed to his protection which the patient might have done (s). As to those to whom the Court appoints guardians the latter have the same powers and authorities as the committee previously had (t). In the case of a municipality or the council thereof the clerk or treasurer of it is the proper person to make the proof(u), and the secretary of the Melbourne and Metropolitan Board of Works may represent the Board in all proceedings against the estate of an insolvent debtor and act on its behalf in all respects(v). Proof on behalf of a company in liquidation may be made by its liquidator, but he should so describe himself (w). When a contributory or other debtor to a mining company becomes insolvent the liquidator may prove for any contribution ordered to be paid or for any other debt due by him (x). The assignee of a debt or other legal chose in action, on notice in writing to the person from whom the assignee would have been entitled to receive or claim such debt or chose in action, has all legal and other remedies for the same subject to the provisions of the <i>Supreme Court Act</i> 1890 (y); but a creditor who has assigned his debt but not given notice of such assignment to the insolvent or assignee of the insolvent estate can prove for the debt in his own name without stating that he is proving for the benefit of the assignees (z). The debt, until notice of assignment, is the debt of the assignor (a).</p>
By municipality.	
By Melbourne and Metropolitan Board of Works.	
By liquidator.	
By assignee of a chose in action.	
By assignor of chose in action.	
By unpaid vendor of goods.	<p>An unpaid vendor of goods who is in possession of them, and the purchase of which the trustee does not complete, is entitled to treat the contract as broken and resell the goods without first tendering them to the trustee, and to prove in the estate for damages for breach of contract, the measure of the damages if the market is falling being the difference between the contract price and the price obtained on the resale (b).</p>
Proof by mortgagees after sale by order of Court.	<p>In case the moneys arising from a sale of mortgaged property by order of the Court (c) be insufficient to meet the payments referred to in r. 90, the mortgagee is entitled to prove for the</p>

(s) *Lunacy Act* 1890, s. 183.(t) *Ibid.*, s. 129.(u) *Local Government Act* 1890, s. 522.(v) *Melbourne and Metropolitan Board of Works Act* 1890, s. 164.(w) *Ex parte Taylor, in re Pooley*, 36 L.T., 679; *Companies Act* 1890, ss. 90, 119.(x) *Companies Act* 1890, s. 296.(y) *Supreme Court Act* 1890, s. 63.(z) *In re Warren, In re McLachlan*, *ex parte Gordon*, 14 A.L.T., 77.(a) *Ibid.*(b) *Ex parte Stapleton, re Nathan*, 10 Ch. D., 586.

(c) R. 90.

balance and to receive dividends, but so as not to disturb any dividend already made (*d*). CHAP. V.

The trustee in insolvency can prove for a debt due to the insolvent (*e*). Trustee in insolvency.

An insolvent cannot prove a debt on his sequestrated estate as the agent of a creditor though he holds a power of attorney (*f*). Proof by insolvent as agent.

Loss owing to the trust property through the dealings of a bankrupt trustee can be proved for by the *cestui que* trust in such manner as may be most for his benefit under the circumstances of the case. He can either prove for the amount of the fund improperly used and interest or for the value of the result of the disposal of the fund if any exists and the amount of the profits thereon (*g*). The amount of a *devastavit* can be proved against the executor's estate either by the legatees or creditors or on their behalf, but the bankrupt trustee cannot prove on his own estate on behalf of the trust estate (*h*). Cestui que trust.

A married woman may prove for a debt due to her as her separate property (*i*). Money or other estate lent or entrusted by a wife to her husband for the purpose of any trade or business carried on by him or otherwise passes to the trustee, but the wife can prove on the estate (*k*). Apart from proof the provision referred to does not apply to a loan by a wife to her husband for a purpose unconnected with his trade or business (*l*). Married woman.

A creditor who has been paid his debt by way of fraudulent preference and has had the amount recovered back from him may prove for his original debt against the estate (*m*). Fraudulently preferred creditor.

The trustee under a marriage settlement when the settlor covenanted that during his life he or his representatives within twelve months after his death would pay the sum of £5,000 to the trustee to be held by him under the trusts of the settlement Trustees under a settlement for the future payment of money not within s. 72, Act of 1890.

(*d*) *Ibid*.

(*e*) S. 85 (8), Act of 1890.

(*f*) *In re Jansen*, 1 A.L.T., 78.

(*g*) *Ex parte Gurner*, in *re Iveson*, 1 Mont. D. & D., 497.

(*h*) *Vide Ex parte Moody and Ex parte Preston*, in *re Warne*, 2 Rose, 413.

(*i*) *Married Women's Property Act*

1890, s. 4.

(*k*) *Married Women's Property Act* 1890, s. 6.

(*l*) *Re Clark, ex parte Schulze*, (1898) 2 Q.B., 330; 5 Manson, 201, approving of *In re and ex parte Tidswell*, 56 L.J.Q.B., 548.

(*m*) *Re Walker*, 3 A.J.R., 55, 89.

CHAP. V. was allowed to prove on the bankruptcy of the settlor before payment, the transaction not being within s. 72, Act of 1890 (n).

Proof when deed declared void under sec. 72.

The legal effect of declaring an assignment void under s. 72 is to place the parties in the same position as if the deed had never been executed (o), and therefore payments made by the assignee, the wife of the insolvent, to a creditor of her husband as part of the transaction were regarded as *bond fide* payments made by her at the request of her husband and were not affected by the previous knowledge of the wife that the husband attempted to defraud his creditors by the assignment, and proof was allowed for the amount actually paid to the creditor less the amount of the proceeds of the property sold under the assignment (p).

Proof by creditors who have signed deed of assignment.

Creditors who have executed a deed of assignment may usually prove in the subsequent insolvency of the debtor. It has been held that it is a question of intention, and where the intention is that the deed is not to operate in the event of insolvency and that the release is to hold good in case the consideration for which it was given holds good and not otherwise, the creditors may prove (q).

Buying off opposition to certificate.

Bills given by an insolvent to a creditor in order to have opposition to the grant of a certificate withdrawn cannot be proved in a second insolvency by such creditor (r).

Rent and periodical payments.

When any rent or other payment falls due at stated periods and the order of sequestration is made at any time other than one of such periods, the person entitled to such rent or payment may prove for a proportionate part thereof up to the day of the date of the order of sequestration as if such rent or payment grew from day to day (s). The fact that the landlord is a preferential creditor does not preclude him from proving for the full amount due. The preference is a matter touching the distribution of the estate (t). Sec. 110, Act of 1890, dealt with the landlord's claim for rent, but for that section the following provisions have been substituted :—

(n) *In re Knight, ex parte Cooper*, 2 Morrell, 223.

(o) *In re Orr*, 15 V.L.R., 590.

(p) *Ibid.*

(q) *In re Stephenson, ex parte Official*

*Receiver*, 5 Morrell, 44.

(r) *In re Cunningham*, 3 V.L.R. (L.),

1.

(s) S. 117, Act of 1890.

(t) *In re Trump*, 6 A.L.T., 2.

(1) No distress for rent shall be made, levied, or proceeded in after sequestration, but the landlord shall be entitled to receive out of the insolvent estate so much rent as shall be then due and payable, not exceeding three months' rent, and in respect of which there were at the date of sequestration goods on the premises in respect of which the rent was payable liable but for insolvency to distress for rent, and shall be allowed to come in as a creditor and share rateably with the other creditors for the balance.

(2) No person entitled to a preference claim for rent hereunder shall be entitled to more than the value of such goods so distrainable, such value to be fixed by the Court in a summary way in the event of the trustee and landlord not agreeing as to the amount (*u*).

Under s. 110, Act of 1890, it was held that the landlord had not a preferential right in any and every event but only in that condition of things where rent was due and where upon the tenant's premises there were chattels which might have been the subject matter of distress for that rent but which would have been given up to and acquired by the estate and for the benefit of it if the distress had not been put in or had not been withdrawn (*v*). A landlord could put in a distress and seize not only the goods of his tenant but those of a stranger upon the premises, but unless there were goods of the tenant upon the premises the withdrawal of the distress did not benefit the estate in any way. The section only applied to cases where there were goods of the tenant upon the premises which the landlord might seize, but which, if he did not, went to the estate (*w*).

The rent is not to be satisfied immediately out of the proceeds as a first charge on them, but the trustee has authority and is under a duty to pay only in the way prescribed by the statute, namely, out of the estate generally (*x*), and the landlord has no lien on the goods distrained for the three months rent (*y*).

(*u*) S. 117, Act of 1897.

(*v*) *In re Gamble*, 19 V.L.R., 627; 15 A.L.T., 174.

(*w*) *Ibid.* And the distress was held good as to the stranger's chattels though the chattels of the insolvent or his trustee were seized with them; *vide*

*Harrison v. The County of Bourke Building, &c., Society*, 2 A.L.R., 90.

(*x*) *Simpson v. Burrowes*, 4 W.W. & A.B. (L.), at p. 152.

(*y*) *Davey v. Bank of New South Wales*, 9 V.L.R. (L.), 252.

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Where there are no goods of the insolvent on the premises the landlord cannot rank as a preferential creditor (*z*). Where the rent is due by joint tenants the landlord is not obliged to abandon his distress in consequence of the subsequent insolvency of one of the joint tenants (*a*), and he is not prevented from distraining after sequestration on goods which the tenant has mortgaged under a bill of sale (*b*). The equity of redemption which the tenant has in the goods is not a chattel and cannot be seized and cannot be the object of distress, therefore it does not come within the section (*c*). The rights of landlords and mortgagees are not varied by the enactment, and where a mortgagee is in possession the value of the goods not being sufficient to satisfy the bill of sale sequestration does not stop the distress (*d*).

Preferential  
debts.  
Rates.

Wages and  
salaries.

Funeral and  
testamentary  
expenses.

Preferential debts are subject to the same obligations as to proof as other debts, and are as follows:—Local rates due by the insolvent at the date of the order of sequestration and having become due and payable within twelve months next before that time: Wages or salary of any clerk or servant in the employment of the insolvent at the date of the order of sequestration and not exceeding four months' wages or salary and not exceeding £50: Wages of any labourer or workman in the employment of the insolvent at the date of the order of sequestration and not exceeding four months' wages. Between themselves such debts rank equally and are paid in full, unless the property of the insolvent is insufficient to meet them, in which case they abate in equal proportions between themselves (*e*). They are paid in priority to all other debts (*e*), excepting in the case of the compulsory sequestration of a deceased person's estate, in which any claim by the representative of the deceased person to payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate is a preferential debt and is payable in full out of the estate in priority to all other debts (*f*).

As to wages and salaries the enactment refers to employes in the employment of the insolvent at the date of sequestration.

(*z*) *In re Brown, ex parte Tolson*, 1 W. & W. (I.), at p. 93.

(*a*) *Officer v. Haynes*, 3 V.L.R. (E.), 115-123.

(*b*) *In re Browning*, 19 V.L.R., 509; 15 A.L.T., 72; following *Railton v. Wood*, 15 App. Cas., 363.

(*c*) *Ibid.*

(*d*) *Vide In re Sweeney, ex parte Diggins*, 4 V.L.R. (I.), 1.

(*e*) S. 115, Act of 1890.

(*e*) *Ibid.*

(*f*) S. 113 (3), Act of 1897.

Piece work is not within the section ; four months' wages means CHAP. V.  
 payment for labour measured by the time employed (*g*); but an Piecework.  
 employé—for example, a commercial traveller—engaged at an  
 annual salary is within the section (*h*). The Legislature contem-  
 plated, not servants hired from day to day, but servants engaged Nature of  
service as to  
wages and  
salaries.  
 upon a salary (*i*), and an employé who receives remuneration by  
 percentage on goods sold alone or with anyone else is not within  
 the section (*j*).

“Clerk” is a person engaged in writing or making calculations Meaning of  
“clerk” and of  
“servant.”  
 and entries. “Servant” in its ordinary acceptation includes one  
 or other or generally both of two elements—employment for a  
 specific time, and employment by which exclusive services are to  
 be rendered by an employé to his employer (*k*). The words  
 “clerk or servant” include the manager of an incorporated com-  
 pany, and all the employés of a bankrupt in his sole service paid  
 by salary or wages as distinguished from piece work, and the  
 words are used as dividing the employés into two main classes,  
 those whose duties are mainly mental and clerical, and those  
 whose duties are mainly manual and physical (*l*). The editor  
 of a newspaper is within the section (*m*); and so is the mate of  
 a ship (*n*).

Where there are numerous claims for wages by workmen and Collective form  
of proof for  
wages.  
 others employed by the debtor it is sufficient if one proof for all  
 such claims is made either by the debtor or his foreman or some  
 other person on behalf of all such creditors (*o*). The form is that  
 numbered 76, Schedule of Forms, *post*, to which is annexed as  
 forming part thereof a schedule setting forth the names of the  
 workmen and others and the amounts due to them (*p*). Any  
 such proof has the same effect as if separate proofs had been  
 made (*q*).

Upon the insolvency or liquidation by arrangement of any Preferential  
claim of Friendly  
Society in  
certain cases.  
 officer of a friendly society having in his possession by virtue of  
 his office any money or property belonging to the society, the

(*g*) *In re Murray*, 5 A.J.R., 3.  
 (*h*) *Ex parte Neal*, in *re Badnall*,  
 Mont. & McA., 194.  
 (*i*) *Ibid.*  
 (*j*) *In re Edwards*, *ex parte Tomlins*,  
 11 V.L.R., 304.  
 (*k*) *Ibid.*  
 (*l*) *Re The Intercolonial Smelting*,

*&c.*, *Ltd.*, 13 V.L.R., 896.  
 (*m*) *Ex parte Chipchase*, *re Stiff*, 11  
 W.R., 11.  
 (*n*) *Ex parte Homborg*, in *re Hudson*,  
 2 Mont. D. & D., 642.  
 (*o*) R. 225.  
 (*p*) *Ibid.*  
 (*q*) *Ibid.*

**CHAP. V.** trustee must upon demand in writing as the case may be of the trustees of the society or any two of them or any person authorised by the society or by the committee of the same, pay such money or deliver over such property to the trustees of the society in preference to any other debts or claims against the estate of such officer (*r*). The society is entitled to be paid even though the moneys are not in possession in specie and cannot be traced (*s*). In the case of an assignment it was held that the presumption was that the officer had not been guilty of embezzlement and that therefore he still had the society's money when he executed the deed and that the trustee as his assignee was obliged to pay the amount over (*t*).

Provision as to preferential claim in case of apprentices and articulated clerks.

Where at the time of the order of sequestration any person is apprenticed or is an articulated clerk to the insolvent the order of sequestration is a complete discharge of the indenture of apprenticeship or articles of agreement if either the insolvent or apprentice or clerk *give notice in writing* to the trustees to that effect (*u*). If any money has been paid by or on behalf of such apprentice or clerk to the insolvent as a fee, the trustee may, on the application of the apprentice or clerk, or of some person on his behalf, pay such sum as such trustee, subject to an appeal to the Court, thinks reasonable, out of the insolvent estate to or for the use of the apprentice or clerk, regard being had to the amount paid by him or on his behalf, and to the time during which he served with the insolvent under the indenture or articles before the commencement of the insolvency and to the other circumstances of the case (*v*). Where it appears expedient to a trustee he may on the application of any apprentice or articulated clerk to the insolvent, or any person acting on behalf of such apprentice or articulated clerk instead of acting as previously set out transfer the indenture of apprenticeship or articles of agreement to some other person (*w*). It is not necessary that an indenture of apprenticeship or articles of agreement should have been actually executed to be within the section if the agreement has been made and premium paid (*x*).

Transfer by trustee of indenture or articles.

(*r*) *Friendly Societies Act* 1890, s. 15  
(7).  
(*s*) *In re Miller, ex parte Official Receiver*, (1893) 1 Q.B., 327.  
(*t*) *Eastwood v. Scott*, 2 V.R. (L.), 101.

(*u*) S. 116, Act of 1890.  
(*v*) *Ibid.*  
(*w*) *Ibid.*  
(*x*) *Ex parte Haynes, in re Donkin*, 2 Gl. & J., 122.



As to when a landlord's claim is preferential, *vide ante*, at p. 284. CHAP. V.

A person entitled to enforce against an insolvent payment of any money, costs or expenses by process of contempt issuing out of any Court is entitled to come in as a creditor under the sequestration and prove the amount payable under the process subject to such ascertaining of the amount as may be properly had by taxation or otherwise (y).

Preferential claim by landlord.  
Costs.  
Money, costs, &c., of which payment may be enforced by process of contempt.

Barristers can sue and recover fees and therefore can prove (z). Barrister's fee.

The English practice (a) to admit the proof of a solicitor as to his bill of costs subject to taxation of the costs is followed except in cases of agreements in writing under the *Supreme Court Act* 1890. A solicitor is entitled to charge interest at six per cent. on his disbursements and costs from the expiration of one month from demand from the client (b), and proof can be made accordingly.

Solicitor's bill of costs.

An office copy of the judgment should be annexed to the proof, as it is under ordinary circumstances conclusive evidence. Where the creditors have agreed with the debtor not to enforce the judgment until after the happening of a certain event, which has not happened, proof cannot be made of it as an absolute debt but only as a contingent liability, the estimated value being the creditor's chance of being able to enforce the judgment (c). As to judgment debt generally, see "Compulsory Sequestrations," Chapter IV., at p. 98. Judgment debt.

All actions pending for damages alleged to be sustained for any injury or wrong or breach of any contract committed by the insolvent (such damages being uncertain), or for recovery of any claim unliquidated as to its amount are stayed on sequestration (d), and the plaintiff after summoning the trustee to take up and defend the action may proceed to obtain the judgment of the Court thereon, and such when recovered together with the taxed costs is a debt provable against the estate (e). The insolvency then clears the defendant from liability for such damages, when the action has been commenced before sequestration. This section is a local

Judgment in an action in tort and on breach of contract.

(y) S. 113, Act of 1890.  
(z) *Legal Profession Practice Act* 1891, s. 5.  
(a) Under 32 & 33 Vict., c. 71.  
(b) *Supreme Court Act* 1890, s. 271.

(c) *Re Merry*, 14 V.L.R., 176.  
(d) S. 77, Act of 1890—compare 5 Vict., No. 17, s. 31; and 28 Vict., No. 273, s. 37.  
(e) *Ibid.*

## CHAP. V.

enactment, and the rule is contrary under the English Act, for there the amount of a judgment in an action in tort is not provable in insolvency unless the judgment is signed before sequestration. If judgment is not signed till after the sequestration even though the verdict was obtained before, the insolvent there remains undischarged from the liability (*f*).

Proof when  
composition  
falls through.

In the event of a composition falling through owing to the failure of the debtor to pay same the original debt revives, and can be proved for on the debtor subsequently becoming insolvent (*i*), unless the deed contains an unconditional release, in which case the original debt cannot be proved for, but only the composition (*j*). A creditor cannot prove for the balance of a composition when the debtor has become insolvent before the composition is fully paid if he has been induced by the payment of a sum of money to concur in the composition; and it appears that where a creditor has been guilty of fraud of this kind he will be bound by the release if the debtor files, and cannot therefore prove for his original debt or the composition, the original claim having been released and the claim under composition being invalidated by the fraud, while as against the other creditors the release is void (*l*).

Where sureties  
are parties to  
the composition.

It sometimes happens in compositions that sureties are parties, and where such an additional debtor is introduced and the amount of the composition is substituted for the old debt proof cannot be made for the latter in the event of insolvency (*m*).

Sureties,  
proof by.

It is necessary for the surety to pay the debt guaranteed by him before he can prove for it against the estate of his principal, and the fourth clause of s. 114, Act of 1890, does not enable him to do so when he has not paid the debt. The surety does not become a creditor of the principal debtor merely by force of the relation existing between them, though the liability of the surety to the creditor may have been absolute (*n*), but if the

(*f*) *In re Newman, ex parte Brooke*, 3 C.D., 494.

(*i*) *Ex parte Bateson, in re Wotherpoon*, 1 Mont. D. & D., 289.

(*j*) *Vide Small v. Marwood*, 9 B. & C., 300.

(*l*) *Vide In re Cross*, 4 De G. & S., 364. *Sed vide in re Jobson*, 5 A.J.R., 154.

(*m*) *Ex parte Hernaman, re Ewens*,

17 L.J. N.S., Bkcy., 17.

(*n*) *In re Hyams, ex parte Balfour*, 5 A.L.T., 112; *In re Maddren*, 1 A.L.R., 100. *Sed vide In re Herepath, ex parte Delmar*, 7 Morrell, 129; *Re Paine, ex parte Whittaker*, (1897) 1 Q.B., 122. *Vide also The Trust and Agency Company of Australia v. Green*, 1 V.R. (L.), 171.

principal debtor becomes bankrupt the surety who has paid the debt has a right to stand in the place of the original creditor against the estate of the principal debtor (*o*). CHAP. V.

The surety is entitled to the benefit of the securities held by the creditor on payment of the debt, the principle being that the surety in effect bargains that the securities which the creditor takes shall be for him if and when he shall be called upon to make any payment (*p*). It can be otherwise however in insolvency if the creditor exercises the option given by the Acts of surrendering the security to the estate (*q*) and proving for the whole amount of his debt, which he is not prevented from doing because a surety for the payment of the debt happens to exist (*r*). The surety in such circumstances is undischarged and loses his right to the securities given up by the creditor (*s*).

When the surety has paid the debt and stands in place of the principal creditor he has all the privileges of such creditor even in the case of that creditor being the Crown (*t*), which, since it is not named by the Acts, is not bound by them (*u*).

The surety can either value his securities, assuming them to be over the insolvent estate or any part of it (*v*), and prove for the balance, or dispose of them in reduction of the debt and prove for any balance then existing (*w*).

It is settled law that if several persons together become surety for one principal in respect of the same debt and transaction either jointly or severally or by the same or different contracts and one of such sureties after the liability of the principal has arisen pays the debt or satisfies the whole debt or claim or more than his own proportion of it he may have recourse to his co-sureties for con-

(*o*) *In re Hyams, ante*.

(*p*) *Forbes v. Jackson*, 19 Ch. Div., at 621; *Bank of Victoria v. Smith*, 20 V.L.R., 450; 16 A.L.T., 92.

(*q*) S. 122, Act of 1890.

(*r*) *Rainbow v. Juggins*, 5 Q.B.D., 422.

(*s*) *Ibid.* In this case Bramwell, L.J., concluded that though a man entering into a contract of suretyship bargains that he shall not be prejudiced by any improper dealing with securities to the benefit of which he as surety is entitled, he makes that bargain with reference to the law of the land, and if that says that under certain cir-

cumstances a creditor is enabled to do the best he can for his own protection, then the contract of suretyship must be taken to be made subject to the liability of these things taking place and therefore subject to the liability of the security being surrendered by the creditor to the trustee.

(*t*) *In re Churchill, Manisty v. Churchill*, 39 C.D., 174.

(*u*) *Reg. v. Griffiths*, 9 V.L.R. (L.), p. 45.

(*v*) S. 67 (5), Act of 1890.

(*w*) *Vide Ex parte Sherrington, in re Boul*, 1 Mont. D. & D., 195; *Baines v. Wright*, 15 Q.B.D., 102.

**CHAP. V.** tribution (*x*). Therefore no difficulty arises in a co-surety proving on the estate of the others or either of them if the debt has arisen as set out. Sureties are entitled to the benefit of all securities which have been taken by any one of them, whether known to the others or not, and a surety is bound as between himself and co-sureties to bring the same into hotch-pot (*y*). In proving the same must therefore be valued (*z*).

If a co-surety however pays part of the principal creditor's claim and less than his proportion he cannot resort to his co-surety, and therefore cannot prove against the estate of the same, and therefore a surety is not entitled to call upon his co-sureties for contribution until he has paid more than his proportion of the debt due to the principal as there is nothing ascertained as a debt which would give him the right to proceed against the co-sureties (*a*).

Proof against  
surety.

When proof  
barred against  
surety by release  
of debtor.

Release by  
operation of law  
no bar.

The right of proof against the surety by the creditor depends upon the agreement existing between the parties, but in the ordinary case of suretyship that of an agreement to pay on default of the principal debtor the right to prove against the surety's estate arises when the principal debtor has made default, but proof is necessarily barred against such estate if the principal debtor has been unconditionally released unless the rights against the surety are expressly reserved by the deed (*b*), and it is also barred if in the case of several sureties one or more are released by the principal creditor when the sureties have contracted jointly and severally the joint suretyship of the others being part of the consideration of the contract of each (*c*), but it is not so barred and the surety is not released where the release of the principal debtor is by the operation of the bankruptcy law even when the creditor assists in obtaining the discharge (*d*), and so also the surety remains unreleased and proof can be made against his estate if the principal creditor has voted in liquidation proceedings for the debtor's discharge, and notwithstanding the fact that the resolution contained no reservation of right against the

(*x*) Addison, 8th ed., p. 669, and authorities there cited.

(*y*) *Steel v. Dixon*, 17 C.D., 825.

(*z*) R. 217.

(*a*) *Ex parte and in re Snowden*, 17 C.D., 44 and 47.

(*b*) *Vide Lewis v. Jones*, 4 B. & C., 506.

(*c*) *Ward v. National Bank of New Zealand*, 8 App. Cas., at p. 764.

(*d*) *Browne v. Carr*, 7 Bing., 508.

surety (e), or if the principal creditor accepts a composition under the Acts it does not discharge the surety (f). CHAP. V.

Though the liability of a co-surety is unascertained at the date of the bankruptcy, such is a debt provable in insolvency within the meaning of s. 114, Act of 1890, and the insolvency can be pleaded as a bar to an action for contribution against the insolvent co-surety (g). Co-surety's liability.

A creditor can prove for the whole amount due to him without deducting any sums paid by the surety unless such amount to twenty shillings in the £, if he is a surety for the whole debt. If, however, the surety is a guarantor for part of the debt, and has paid that part, then by virtue of that payment the surety can prove for the amount paid in place of the principal creditor, but he cannot prove if he is a surety for the full amount of the debt, even though his liability be limited to a fixed amount which he has paid unless he pays the whole amount of the debt due to the principal creditor for which he is surety (h). Proof by creditor on payment of part of sum guaranteed.

Where a bankrupt and others had become guarantors of a principal debtor's liability, and three of the guarantors thereafter entered into an agreement with the creditor that their liability should be limited in this way, that there should be substituted for it, a cash deposit to be carried to a suspense account with power to the creditor to appropriate that sum whenever it thought fit in discharge *pro tanto* of the principal debt, the deposit did not until appropriation operate as payment, and the creditor was therefore entitled to prove for the full amount of its debt against the estate of the bankrupt co-surety who was not a party to the agreement (i). Proof against co-surety.

The period of credit given to a debtor on a bill or promissory note is determined by the sequestration (k), and where the creditor seeks to prove in respect of a bill of exchange, promissory note, or other negotiable instrument or security on which the debtor is liable, the same must subject to any special order of the Court Proof as to bills of exchange and promissory notes.

(e) *Ellis v. Wilmot*, L.R., 10, Ex., 10.

(f) *Ex parte and in re Jacobs*, L.R., 10 Ch., 211.

(g) *Wolmershausen v. Gullick*, (1893) 2 Ch., 514.

(h) *In re Bass, ex parte National Provincial Bank &c.*, (1896) 2 Q.B., 12;

3 *Manson*, 125.

(i) *Commercial Bank of Australia Limited v. The Official Assignee of the estate of Wilson*, (1893) App. Cas., 181.

(k) *In re and ex parte Raatz*, (1897) 2 Q.B., 80; 4 *Manson*, 127, and see also p. 96 as to a petition based on an undue bill, and s. 106 (2), Act of 1897.

**CHAP. V.** to the contrary, be produced to the assignee, chairman of a meeting or trustee, as the case may be, before the proof can be admitted either for voting or dividend (*l*). The rules in insolvency relating to bills of exchange, promissory notes and cheques apply notwithstanding anything contained in Part I. of the *Instruments Act* 1890 (*m*). The principles or rules intended to be preserved, are such rules as the making of proof on bills or notes not yet due, the rule prohibiting double proof (*n*), and the rule that the holder is entitled to prove in the insolvency of the acceptor for the full amount of a bill of exchange accepted for the accommodation of the drawer, and deposited by him (the drawer) as security for a debt less than the amount of the bill, but in such a case he cannot receive dividends in excess of the debt due to him by the drawer (*p*).

Proof by holder of bill.

A holder of a bill or note may prove against all the parties liable on it to him, the term "holder" being here used in the sense of (1) an ordinary holder, *i.e.*, the payee or indorsee of a bill or note who is *bond fide* in possession of it or the bearer thereof; (2) "holder for value"; (3) "holder in due course" (*q*).

Where the bill is one which has been paid for honour the holder only succeeds to the rights and duties of the party for whose honour he pays (*r*) and can only prove therefore against the parties to the bill liable to that party, all parties subsequent to the party for whose honour it is paid being discharged (*r*). Subject to the provisions in Division 3 of the *Instruments Act* 1890, the provisions of that Act relating to bills of exchange apply with necessary modifications to promissory notes (*s*), and in applying such provisions, the maker of a note corresponds with the acceptor of a bill, and the first endorser corresponds with the drawer of an accepted bill payable to drawer's order. It can be regarded as a general rule that what would constitute a good defence to an action on a bill will form a good objection to proof on the same; but where, however, the bill has been given for a debt and dishonour or insolvency occurs the original right of action revives, and with it the right of proof apart from the bill

(*l*) R. 226; *vide* also r. 242.

(*m*) S. 105, *Instruments Act* 1890.

(*n*) *Vide Banco de Portugal v. Waddell*, 5 App. Cas., 161.

(*p*) *Vide Ex parte Newton, ex parte*

*Griffin In re Bunyard*, 16 C.D., 330.

(*q*) *Vide Instruments Act* 1890.

(*r*) *Instruments Act* 1890, s. 69 (5).

(*s*) *Instruments Act* 1890, s. 90 (1).

as between the particular parties to the debt where the plaintiff has been guilty of no laches (*t*). In respect to proofs on the instruments themselves as negotiable securities the bill or note must be complete and regular on the face of it and as to duty stamps (*u*). The holder of a promissory note not duly stamped was only protected if when he received the document the stamp upon it was sufficient in amount, and on the stamp appeared a name or initials which might be those of the proper person and a date which might be the proper time as it would then have purported to be "duly cancelled" (*v*). But since the *Stamps Act* 1892 became law, s. 6 of that Act has been interpreted to mean that every note made after 1892 must be stamped with an impressed stamp (*w*). No protection is now needed for *bond fide* holders since they can see upon the face of the note itself whether it is properly stamped or not (*x*).

As to the amount of the bill proof can be made for the full amount by the holder. Where a debtor has transferred a bill amounting to a larger sum than the debt existing between them, proof can be made against the estate of all the parties to the bill, excepting that of the debtor, against which he can only prove for the amount of the actual debt existing (*y*). Where a bill is payable to bearer and the holder negotiates it by delivering without endorsing it he is not liable on the instrument (*z*), and proof therefore cannot be made on it against the estate of the transferror by delivery.

The amount of bills discounted by the debtor with the creditor forms only a contingent debt as regards the drawer and endorsers when current, and such cannot be proved against the drawer's estate as an absolute debt, but should be proved as a contingent debt only. It is only in the event of the dishonour of any of them that a claim for those dishonoured would arise, and that claim by the creditor would then be on the bills as endorsee (*a*).

(*t*) *Vide* Bullen and Leake's Precedents of Pleadings, 4th ed., Part II., 139 and 284.

(*u*) *In re Algar*, 8 A.L.T., 51.

(*v*) *The Australasian Mortgage and Finance Company Limited v. Guthridge*, 17 V.L.R., 622.

(*w*) *Preacher v. Edgerton*, 16 A.L.T., 28.

(*x*) *Ibid*, at p. 29.

(*y*) *Ex parte Bloxham*, 6 Ves., 449; 5 R.R., 358; *Ex parte Newton*, *Ex parte Griffin*, in *re Bunyard*, 16 C.D., 330.

(*z*) *Instruments Act* 1890, s. 59.

(*a*) *In re Bayldon*, *ex parte The Bank of Australasia*, 1 V.L.R. (I.), 10.

**CHAP. V.** The amount of the discount, however, need not be deducted from the proof (b).

Onus of proof  
when fraud  
proved.

When fraud is proved the burden of proof is on the holder to show that value has been given and that it has been given *bonâ fide* before he can recover (c).

Accommodation  
bills.

As the accommodation party is liable on the bill to a holder for value whether when such holder took the bill he knew such party to be an accommodation party or not (d), proof can be made by such holder against his estate, and proof can be made for the full amount of the bill by the holder when the bill has been indorsed to him as security for a lesser amount, but dividends only can be received to the extent of such lesser amount (e). As an accommodation party is in substance a surety for the person accommodated (f) the laws of proof applicable to sureties apply to him, and he is therefore entitled to the benefit of any securities deposited by the person accommodated with the holder of the bill (g); as to his discharge, if the payee merely gives the maker time without receiving any consideration for his promise the surety is not thereby discharged, but if the payee put himself into such a position that he could not sue the principal debtor he discharges the surety, *e.g.*, if he takes from the principal debtor another promissory note for an amount including the amount of the first note (h).

An accommodation party made certain promissory notes renewals of prior ones in favour of one B., who endorsed same to a plaintiff bank. Prior to defendant making the renewal notes the manager of the bank and B. made a verbal agreement that the said B. should procure the defendant to make the renewal notes upon the express terms that the defendant should not be liable in respect thereto. The accommodation party was held to be not liable on the notes (i), that being so proof against his estate in the event of insolvency would be extinguished on such an instrument.

(b) *Ex parte Marlar*, 1 Atk., 150.

(c) *Talam v. Haslar*, 23 Q.B.D., 345.

(d) *Instruments Act* 1890, s. 29.

(e) *Ex parte Newton, ex parte Griffin*,  
in re *Bunyard*, 16 C.D., 330.

(f) *Vide Instruments Act* 1890, s. 29.

(g) As to surety's position, *vide*  
*Bechervaise v. Lewis*, L.R. 7 C.P., 372.

(h) *Mackenzie v. West*, 16 V.L.R.,  
p. 588.

(i) *Bank of South Australia v. Wil-*  
*liams*, 19 V.L.R., 514.



No proof can be made in respect to a bill when the same is discharged (k). CHAP. V.

Extinguishment  
of proof by  
discharge of  
bill and of  
parties.

A bill is discharged and proof extinguished—(1) by payment in due course by or on behalf of the drawer or acceptor, or in the case of an accommodation bill by the party accommodated; (2) when the acceptor of a bill is or becomes the holder of it at or after its maturity in his own right; (3) when the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor in writing, or by delivery up to the acceptor; (4) where a bill is intentionally cancelled by the holder or his agent and the cancellation is apparent thereon; (5) where a bill or acceptance is materially altered without the consent of all parties liable on the bill it is avoided except as against a party who has himself made an alteration or assented to the alteration and subsequent endorsers, but where a bill has been materially altered but the alteration is not apparent and the bill is in the hands of a holder in due course such holder may avail himself of the bill as if it had not been altered and may enforce payment of it according to its original tenor (l). Likewise proof is extinguished against the estates of those parties to bills who have been discharged, as there may be an extinguishment of liability as to one or more parties to a bill in contradistinction to a discharge of the bill generally. Specific parties to a bill may be discharged—(1) by renunciation subject to the right of a holder in due course without notice of the same; (2) by intentional cancellation of the signature or signatures by the holder or his agent, in which case any endorser who would have had a right of recourse against the party whose signature is cancelled is also discharged; (3) where the bill has been materially altered without the parties' assent but subject to the proviso that where the alteration is not apparent a holder in due course is not prejudiced; (4) by operation of law; (5) as to any drawer or endorser to whom notice of dishonour has not been given subject to the rights of a holder in due course. If not duly presented the drawers and endorsers are discharged (m).

Discharge of  
specific parties  
to a bill.

(k) *Vide Instruments Act 1890, Part I., Division 1 (7); and vide Harner v. Steele*, 4 Exch., 1; *Burbridge v. Mannors*, 3 Camp., 193; 13 R.R., 786.

(l) *Vide Instruments Act 1890, ss. 60 to 65.*

(m) *Vide Instruments Act 1890, ss. 63, 64, 65, 49, 43, 46.*

**CHAP. V.** Debts due to trust estates should be proved by the trustee, executor or administrator as the case may be as the legal representative. The provisions of s. 21, Act of 1890, are availed of in practice in cases where there are more than one representative.

Trustees,  
executors and  
administrators.

Joint and several  
proof on breach  
of trust.

*Statute of  
Limitations.*

Proof can be made against the estates of trustees jointly and severally if a breach of trust is committed by either one of them (*n*), breaches of trust being provable against joint or separate estates because trustees are held to undertake jointly and severally for the performance of their duties (*o*). As to proof against trustees no claim of a *cestui qui trust* against his trustee for any property held on an express trust or in respect of any breach of such trust was formerly barred by any *Statute of Limitations* (*p*); but by s. 29 of the *Trusts Act* 1896, the *Statute of Limitations* may now be pleaded except where the claim is founded on any fraud or fraudulent breach of trust to which a trustee was a party or privy or is to recover trust property or the proceeds thereof still retained by the trustee or previously received by him and converted to his use.

Joint creditors.  
Partners, proof  
by.

Proof against  
partners by joint  
creditors.

Any proof of debt may be made by one partner on behalf of the others (*q*). The names of the members of the firm should be set out in the proof (*r*). Joint debts are those for which the partners are jointly liable, and no distinctive case can be drawn between joint debts so as to exclude from proof against the joint estate any joint debt not incurred in the strict sense of the term as a partnership transaction (*s*). Joint creditors are admitted to prove against separate estate but subject to the exceptions mentioned hereafter cannot receive a dividend until an account is taken and the separate creditors paid (*t*).

Against separate  
estate by joint  
creditors.

In the administration of partnership estates the joint and separate estates are appropriated in the first instance to the joint and separate creditors respectively. There are four exceptional cases in which it has been held that a joint creditor is at liberty

(*n*) *Vide In re Parker, ex parte Shepard*, 19 Q.B.D., at p. 87, referring to *Emma Silver Mining Company v. Grant*, 17 C.D., 122, 130; and *Ex parte Adamson, in re Collie*, 8 C.D., at p. 824.

(*o*) *Ex parte Adamson, in re Collie*, ante, per Bramwell, J.

(*p*) *Supreme Court Act* 1890, s. 63 (2).

(*q*) S. 22, Act of 1890.

(*r*) *In re Algar*, 8 A.L.T., 51; and vide Schedule of Forms, No. 75, Appendix, post; sed vide s. 13, Act of 1897.

(*s*) *Hoare v. The Oriental Bank Corporation*, 2 App. Cas., 589.

(*t*) *Ex parte Elton*, 3 Ves., 238, 243; 3 R.R., 84, 89; s. 44, Act of 1897.

to prove and rank on the separate estate of the partner (*u*). These cases are those—(1) in favour of the petitioning creditor; (2) where there is no joint estate and no solvent partner who can be sued; (3) where the property of the firm has been fraudulently converted; (4) proof on behalf of the joint estate where there has been a distinct separate trade in respect of which a separate debt has been contracted. The first exception applies where one member of a firm has been made insolvent on the petition of a joint creditor or creditor of the firm. The joint creditor is allowed to prove and rank in the separate estate on the ground that it would be inequitable to exclude him, as the sequestration brought about by him is to be regarded as for the benefit of the separate creditors (*v*), and where the creditor holds security on the separate estate he need not offer to give up or value such securities in a proof against the joint estate (*w*), and the creditor need not offer to give up or value a security which he holds against the joint estate in proving against the separate estate (*x*). The second exception is that if in the case of an insolvent firm there is no joint estate and no solvent partner who can be sued, a joint creditor is entitled to prove and have his debt paid out of the separate estates of the partners *pari passu* with the separate creditors (*y*). This rule has been put in an amplified form as follows:—“Where the firm being bankrupt there is no joint estate, or where one partner only being bankrupt there is no joint estate and no living solvent partner known as such to the creditor when the debt was contracted and resident within the jurisdiction of the Court” (*z*). As to the third exception proof is admitted against the separate estate if a partner has fraudulently converted to his own use property belonging to the firm (*a*).

(*u*) *In re Budgett, Cooper v. Adams*, (1894) 2 Ch., at p. 560; 1 Manson, 230; and *vide* Lindley on Partnership, 6th ed., 749.

(*v*) *Ex parte Ackerman*, 14 Ves., 604; 9 R.R., 358; see also *In re Stevenson*, 19 V.L.R., at p. 672; *Ex parte De Tastet*, 17 Ves., 247; 11 R.R., 70.

(*w*) *Ex parte Flower, in re Rutledge*, 1 W. & W. (I.), 143; same case on appeal, *Rolfe v. Flower*, L.R. 1 P.C., 27.

(*x*) *In re Stevenson*, 19 V.L.R., 660; 15 A.L.T., 119.

(*y*) *In re Carpenter, ex parte Besley and Wilson*, 7 Morrell, 270; *In re*

*Budgett, Cooper v. Adams*, 1 Manson, 230; (1894) 2 Ch., 557.

(*z*) Digest of the Law of Partnership (Pollock), at p. 108, relying on *Ex parte Bauerman*, 3 Dea., 479; Lindley, ii., 1234; *ex parte Hodgkinson*, 19 Ves., 294; 13 R.R., 199; as to the statement that proof is not excluded by the fact of there being a dormant partner who is solvent; and *Ex parte Pinkerton*, 6 Ves., 814, as to the admission of proof where there was a solvent partner abroad and not likely to return.

(*a*) Lindley, *ante*, and cases therein cited.

CHAP. V. This rule has also been put in an amplified form as follows:—

“Where a partner has fraudulently converted partnership property to his own use without the consent or subsequent ratification of the other partner or partners” (b). In the fourth exception proof is allowed to be made on behalf of the joint estate of a firm against the separate estate of one of its partners who has carried on a trade *distinct* from that of the firm and has become indebted to it *in the ordinary course of his distinct trading* (c).

Proof by one partner against another in similar cases.

The principle which allows joint estate to prove against separate estate and separate estate against joint estate where there has been a fraudulent conversion of property or where there have been distinct trades and a debt contracted in the course of those trades is also applicable to proof by one partner against another in similar cases (d).

Proof against partners by joint and separate creditors.

A joint and separate creditor can prove against both the joint and separate estates of the persons liable (e).

Separate creditor may prove against insolvent in joint insolvency.

A separate creditor by r. 238 is at liberty to prove his debt under any sequestration made against the insolvent jointly with any other person or persons.

Allowance of double proof on distinct contracts.

With a view of taking out of the way a difficulty which formerly existed in certain cases against double proof and to say that certain things shall not prevent double proof (f) the provisions of s. 119 were enacted as follows:—“If an insolvent is at the date of the order of sequestration liable in respect of distinct contracts as member of two or more distinct firms or as a sole contractor and also as member of a firm the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors shall not prevent proof in respect of such contracts against the properties respectively liable upon such contractors” (g).

(b) Pollock, *ante* at p. 109; this he observes seems to be the true form of the rule on a comparison of *Ex parte Harris*, in *re Ramsey*, 2 V. & B., 210, 1 Rose, 437, with *Ex parte Yonge*, in *re Slaney*, 3 V. & B., 31, 2 Rose, 40, and the judgment of Jessell, M.R., in *Lacey v. Hill*, 4 C.D., 537, affirmed *sub nom. Read v. Bailey*, 3 App. Cas., 94.

(c) *Vide* Pollock, *ante*.

(d) *Vide* Lindley on Partnership, 6th ed., 756.

(e) *Vide* s. 119, Act of 1890, and *Ex*

*parte Honey*, in *re Jeffery*, L.R., 7 Ch. 178; *Ex parte Harding*, in *re Smith, Fleming & Co.*, 12 Ch. D., 557; and *In re Parker*, *ex parte Sheppard*, 19 Q.B.D., 84; 4 Morrell, 135.

(f) See remarks of Earl Cairns in *Banco de Portugal v. Waddell*, 5 App. Cas., at p. 167.

(g) The word “contractors” at the end of the section is evidently a mistake for “contracts.” S. 119, Act of 1890—compare 32 & 33 Vict. c. 71, s. 37, r. 223.

Two instances explain this enactment (*h*):—(1) A., B., and others are partners in a firm of A. & Co. A joint and several promissory note is made and signed by A. & Co., by A. and B. separately and by other persons. Afterwards the firm of A. & Co. becomes bankrupt. Here the contract of the firm and the separate contracts of A. and B. contained in the same note are distinct contracts within the above rule, and the holder of the note may prove against and receive dividends from both the joint estate of the firm and the separate estates of A. and B. (*i*). (2) A. and B. are partners. They borrow a sum of money for partnership purposes from C., and C. settles the debt upon certain trusts by a deed in which A. and B. jointly and severally covenant with D. to pay the sum. The deed does not show that A. and B. are partners or that the debt is a partnership debt. The firm becomes bankrupt. Here it may be shown by external evidence that the joint contract of A. and B. in the deed is in fact the contract of their firm, and D. may prove against the joint estate of the firm in respect of the joint covenant and against the separate estates of A. and B. in respect of their several covenants (*k*).

The provision has no application to a case of two bankruptcies either in the same country or in different countries against the same identical individual or individuals (*l*) as the statute supposes a case where there are two contracts and also two firms or an individual and a firm in which cases the rule against double proof is relaxed. Formerly a joint and separate creditor had to elect whether he would prove and rank against the joint or separate estates as it was considered to be a preference and therefore a violation of an equal distribution of the debtor's estate amongst the creditors (*m*).

Primarily a partner in an insolvent firm cannot prove against the joint estate in competition with the creditors of the firm (*o*), nor can a firm prove against the separate estate of a partner in

Proof by partners in competition with creditor.

(*h*) *Vide* Pollock's Digest of the Law of Partnership, 120.

(*i*) *Ex parte Honey*, in *re Jeffery*, ante.

(*k*) *Ex parte Stone*, in *re Welch*, L.R. 8 Ch., 914.

(*l*) *Banco de Portugal v. Waddell*, ante.

(*m*) *Vide Ex parte Bond and Hill*, 1 Atk., 98.

(*o*) *Nansen v. Gordon*, 1 App. Cas., 195.

## CHAP. V.

(a) Proof by partner as against the joint estate.  
(b) Proof by firm as against separate estate.

it (*p*). To both of these cases there are exceptions:—Firstly where the separate property of a partner has been fraudulently dealt with as property of the firm (*q*), and where the joint property has been fraudulently dealt with as property of the separate estate of a partner (*r*). As to the fraudulent dealing, Lord Cairns says in *Head v. Bailey*, 3 App. Cas., at p. 100:—"Where you have a "conversion of the property of the firm to the purposes of the "individual members not by way of contract or agreement with "the firm, not within the knowledge or the cognizance of the firm, "but by a fraud of the individual partner to which the firm is no "assenting party of which its other members are not cognizant "and cannot be cognizant, there the reason for the rule ceases and "the firm whose assets have thus been fraudulently abstracted "ought not to suffer and ought not to be deprived of the right to "proceed against the separate estate in competition with any "other claimants" (*s*). Secondly, where there are two distinct trades carried on by the firm and by one or more members of it (*t*). The question of what is a dealing in a distinct trade is always to be looked at with great care (*u*). Further, if there are no joint creditors or none who have proved, a partner of a firm can prove against the joint estate (*v*), and the rule therefore that neither a partner nor a retired partner nor the representatives of a deceased partner can prove on the estate of the continuing or surviving partner or partners in competition with the joint creditors of a firm of which one partner or retired or deceased partner was a member has no application unless some joint debt has been proved. The mere possibility that such debts may be proved is not sufficient to introduce the rule referred to (*w*).

Proof by partner against separate estate of co-partner.

A partner can prove against the separate estate of his co-partner when all the joint creditors are satisfied (*x*) or when it is plain that there can be no surplus of the separate estate to distribute amongst the joint creditors (*y*). The equity between the

(*p*) *Ex parte Turner*, in *re McKenzie*, 4 Deac. & Ch., 169; vide *Ex parte Smith*, in *re Harding*, 1 Gl. & J., 74.

(*q*) *Ex parte Sillitoe*, in *re Goodchilds*, 1 Gl. & J., at p. 382, referring to *Ex parte Kendal*, in *re Dawes*, 1 Rose, 71.

(*r*) *Ex parte Harris*, in *re Ramsey*, 1 Rose, 437.

(*s*) Vide also *Lodge and Fendal*, 1 Ves. junr., 166; 1 R.R., 99.

(*t*) *Ex parte Sillitoe*, in *re Goodchilds*,

ante.

(*u*) *Ibid*, at p. 383.

(*v*) *Ex parte Andrews*, in *re Wilcoxon*, 25 C.D., 505.

(*w*) *Ibid*.

(*x*) *Re Brown, Stansfeld and Company*, 3 A.J.R., 19.

(*y*) Vide *Ex parte Sheen*, in *re Wright*, 6 C.D., at p. 238, referring to *Ex parte Topping*, 4 D.J. & S., 551.

partners on which Lord Loughborough's rule is based is satisfied when the joint assets are appropriated primarily to the joint liabilities, and the separate assets to the separate liabilities, and there is nothing in such rule to prevent a solvent partner proving against the separate estate of his co-partner on the ground that the dividend arising from such will swell the surplus that will eventually arise from the solvent partner's estate to pay the joint creditors of the partnership (a).

A person who lends to another engaged or about to engage in any business on a contract to receive a rate of interest varying with the profits or to receive a share of the profits, or who has sold the goodwill of a business in consideration of receiving by way of annuity or otherwise a portion of the profits (b), cannot prove until after the other creditors have been paid in full (c). A contract that a person shall receive a fixed sum "out of the profits" of a business is equivalent to a contract that he shall receive "a share of the profits" within the meaning of the *Partnership Act* (d). The contract may be either oral or in writing (e).

Proof by person lending or selling in consideration of a share of profits in business.

Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise are not provable in insolvency (f).

Unliquidated damages.

Contingent debts and liabilities to which the insolvent is subject at the date of the order of sequestration, or to which he may have become subject before he obtains his certificate by reason of any obligation incurred previously to the date of the order of sequestration, are debts provable in insolvency (g). For this class of debts an estimate is directed to be made according to the rules of Court for the time being in force (h) so far as the same may be applicable, and where they are not applicable at the discretion of the trustee of the value thereof. Any person aggrieved by any estimate made by the trustee, may appeal to the Court, and the Court may, if it think the value

Contingent and uncertain debts.

(a) *In re and ex parte Head*, (1894) 1 Q.B., 638; 1 Manson, 38.

(b) *Ss. 6 and 7, Partnership Act 1891.*

(c) *Vide In re Hildesheim*, (1893) 2 Q.B., 357.

(d) *In re Young, ex parte Jones*, (1896) 2 Q.B., 484.

(e) *In re Fort, ex parte Schofield*,

(1897) 2 Q.B., 495; 4 Manson, 234.

(f) *S. 114, Act of 1890.*

(g) *Ibid.*

(h) The rules appear to be silent on this point. Under the corresponding section of the English Act the trustee makes the estimate. *Vide s. 37, Bankruptcy Act 1883.*

**CHAP. V.** of the debt or liability incapable of being fairly estimated, make an order to that effect, and upon such order being made such debt or liability for the purposes of the Act is deemed to be a debt not provable in insolvency; but if the Court think that the value of the debt or liability is capable of being fairly estimated it may direct such value to be assessed with the consent of all the parties interested before the Court itself without the intervention of a jury, or if such parties do not consent, by jury either before the Court itself or some other competent Court, and may give all necessary directions for such purpose, and the amount of such value when assessed is provable as a debt under the insolvency (*i*).

Damages in  
action of tort.

Damages recovered in an action of tort are not provable under the section quoted unless judgment is signed before the adjudication though the verdict may have been recovered before (*k*). The words at the beginning of the section are "clear negative words." Unless judgment has been signed damages for a tort are not included in the second clause of the section commencing "save as aforesaid," and when judgment is signed after the adjudication the amount of the judgment is not a debt or liability to which the bankrupt is subject at the date of the adjudication or to which he has become subject afterwards by reason of any obligation incurred previously to the adjudication (*l*).

The Act of 1890, however, contains another section (77), a local one and not contained in the English Act, on which the above decisions were given, and provides a means for proof for damages in tort and consequently relief to the insolvent of such liability. The section provides that:—All actions pending against any insolvent for damages alleged to have been sustained from any injury or wrong or breach of any contract committed by him (such damages being uncertain) or for recovery of any claim unliquidated as to its amount shall be stayed by the sequestration, but the plaintiff therein after summoning the assignee or trustee to take up and defend the said action may proceed to obtain the judgment of the Court thereon and such judgment when recovered together with the taxed costs of suit is a debt provable against the estate.

(*i*) S. 114, *ante*—compare 32 & 33 Vict. c. 71, s. 31; 46 & 47 Vict. c. 52, s. 37.

(*k*) *Vide In re Newman, ex parte*

*Brooke*, 3 Ch. D., 494.

(*l*) *Ibid*, per James, L.J., at pp. 496, 497.



The amount of bills discounted by a creditor for an insolvent but not matured, is a contingent debt and cannot be proved as an absolute debt (n), and so also is that of a judgment entered up on the understanding that it was not to be enforced until the defendant became entitled to the payment of certain money which he expected to recover, the Court indicating that the measure of the estimated value of the contingent liability was the plaintiff's chance of being able to enforce the judgment (o). A mortgage deed contained an independent covenant that during the term of six years the debtor would order, take, receive and purchase in each year such quantity of goods as would amount in respect to the three first years to a certain sum and in respect of each succeeding year to a certain other sum per year. On the bankruptcy of the debtor a proof was made for alleged loss of profit on the uncompleted contract. It was held that proof on the covenant should be admitted as the liability was not incapable of estimation (p). Money uncalled on shares is a contingent liability provable in insolvency (q). In the case cited the passages from Lindley on Company Law, 5th ed., p. 556—"When a shareholder "becomes bankrupt all calls in arrear are provable as debts and his "liability to future calls may be estimated and proved as well when "the company is being wound up as when it is not. If the shares "are neither disclaimed nor sold by the trustee but are allowed to "remain in the name of the bankrupt and he obtains his discharge "it seems that he will nevertheless be freed from calls in respect "to them, as his liability to them was capable of proof"—were approved of (r).

Proof on bonus covenant in mortgage.

Uncalled liability on shares.

No proof can be had in respect of instalments of alimony due nor for arrears accrued due before the sequestration (s); neither can proof be made for future instalments of it (t), as the obligation to pay alimony is not an obligation from which a bankrupt can get either discharge or relief by bankruptcy at all (u); nor is the liability for the amount ordered to be paid

Alimony.

(n) *In re Bayldon, ex parte Bank of Australasia*, 1 V.L.R. (I.), 10.

(o) *In re Merry*, 14 V.L.R., 176; 10 A.L.T., 125.

(p) *In re Allen, ex parte Strong*, 10 Morrell, 84.

(q) *In re The Melbourne Loco. and Engineering, &c., Company, Limited, Neaves case*, 21 V.L.R., at p. 447.

(r) *Vide also Re Mercantile Mutual Marine Insurance Association*, 25 C.D., 415.

(s) *Kerr v. Kerr*, (1897) 2 Q.B., 439; *In re and ex parte Hawkins*, 1 Manson, 6.

(t) *In re and ex parte Linton*, 15 Q.B.D., 239.

(u) *In re and ex parte Hawkins*, 1 Manson, at p. 9.

**CHAP. V.** for the maintenance of a wife or children (*v*), and therefore as the insolvent is not discharged proof cannot be made on the estate. As to neglected children, *vide Neglected Children's Act 1890*, s. 53.

Maintenance of wife and children.

Neglected children.

Proof of debt proved in prior bankruptcy.

Reviver.

A debt in a prior bankruptcy can be revived by an advance from the creditor to the bankrupt in consideration of the debt being revived. The transaction not being unlawful, or a mere sham for purposes of proof, the revived debt can be proved in a subsequent bankruptcy (*w*).

Proof as to property disclaimed by trustee.

Any person injured by the operation of s. 84, Act of 1890, relating to the disclaimer of onerous property by the trustee becomes a creditor to the extent of the injury incurred, and may prove for the same under the insolvency (*x*). Thus where A. was trustee in B.'s bankruptcy, B. had certain shares which A. disclaimed. The company made a call and lodged a proof for the amount of the call. The trustee admitted the proof and disclaimed the shares. The company then lodged an amended proof for the whole amount of the liability on the shares, and on this being rejected by the trustee, except as to the amount of the call, it was held that the liquidator of the company was entitled to prove as damages caused by the disclaimer the whole amount unpaid on the shares less the amount of any advantages which might accrue to the liquidator from the disclaimed shares (*y*). Where the assignee of a repairing lease had become bankrupt and his trustee had disclaimed the premises, which had become depreciated in letting value, the assignor was allowed under his covenant of indemnity to prove as damages—(1) two quarters rent from the date of disclaimer so as to allow him time to repair and re-let; (2) the diminution in letting value for the residue of the term; (3) the amount of the dilapidations (*z*). And where the insolvents were partners, and the trustee disclaimed a lease of premises used by the partners for partnership purposes, but which was granted to the partners for such as joint tenants, they entering into joint and several covenants to pay the rent, the lessor, it was held, could prove against the separate estates of each partner (*a*).

The like as to partnership property.

(*v*) *Re Harris*, 6 V.L.R. (L.), 47.

(*w*) *In re Aylmer*, *ex parte Crane*, 1 Manson, 391; distinguishing *In re Gomersall*, *ex parte Gordon*, 1 C.D., 137.

(*x*) S. 84, Act of 1890.

(*y*) *In re Hallett*, *ex parte National*

*Insurance Corporation*, 1 Manson, 390; (1894) W.N., 156.

(*z*) *In re Carruthers*, *ex parte Tobit*, 2 Manson, 172.

(*a*) *Ex parte Corbett*, in *re Shand*, 14 C.D., 122.

Where execution of a judgment is stayed by the sequestration under s. 76, Act of 1890, the person having right to such judgment may prove his debt against the estate (b). Where an action is pending against an insolvent for a debt provable in the insolvency all proceedings are stayed by the order of sequestration, and the plaintiff may prove his debt together with the taxed costs of it then incurred (c). As to actions pending against an insolvent for damages alleged to have been sustained from any injury or wrong or breach of any contract committed by him, see *ante* at p. 304 hereof.

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Proof in respect to actions pending against insolvent at sequestration.

Proof is barred by the *Statute of Limitations* (d), but although the debt is statute barred, if a creditor has a lien the limited right is recognised in bankruptcy that he may make use of it to enforce payment of his debt (e). The effect of the statute on the proof may be avoided by a subsequent acknowledgment of the debt, and in a case in point the debtor having regard to his possible bankruptcy sent a sum of five pounds with the express intention of reviving a debt of three thousand pounds, and, on the proof being rejected by the trustee, it was held on appeal that the intention of the bankrupt being to revive an honest debt and not to prefer one creditor before others the proof must be admitted (f).

The Statute of Limitations and proof and revival of debt.

A secured creditor is a creditor holding any mortgage, charge or lien on the insolvent estate or any part thereof as security for a debt due to him (g), and which will continue to be held by him after sequestration of the debtor's estate unless he does some act giving up the security (h). A security may, as in the case of an execution against property levied by seizure, pass to the estate upon adjudication of sequestration, in which case the petitioning creditor is not a secured creditor (i).

Secured creditors and debts.

The provisions of the Act of 1890 relating to proof by secured creditors refer only to security on the insolvent estate or part thereof, and they have no application to a creditor who holds security for his debt on the estate of a third person (k), nor to a

(b) S. 76, Act of 1890.

(c) S. 77, *ibid.*

(d) *Re Hepburn, ex parte Smith*, 14 Q.B.D., at p. 400.

(e) *Ibid.*

(f) *In re Lane, ex parte Gaze*, 6 Morrell, 143.

(g) S. 67 (v.), Act of 1890.

(h) *In re Little*, 18 V.L.R., 777; 14 A.L.T., 122.

(i) *In re Kennedy, ex parte Tatterson*, 18 V.L.R., 688; 14 A.L.T., 68.

(k) *Ex parte Parr*, 18 Ves., 65; 11 R.R., at p. 149.

CHAP. V. creditor holding a guarantee of a third person (*l*). It has been

Creditor holding  
bills on which  
insolvent and  
others are liable.

held that a creditor who holds bills on which the insolvent and other persons are liable as collateral security is not a secured creditor (*m*), but a creditor cannot vote on a current bill of exchange or promissory note held by him unless he is willing for the purposes of voting, though not for the purpose of dividend, to treat the liability to him of every person who is liable thereon antecedently to the debtor as a security in his hands in the terms provided by s. 121, Act of 1897; *vide ante*, at p. 161. A person who obtains an order appointing a receiver of the debtor's interest under a will is not a secured creditor, as such an order does not create a mortgage or a charge or a lien upon such debtor's interest (*n*), but a judgment creditor who has obtained a garnishee order is as soon as the attachment issues a secured creditor within the meaning of s. 67 (5), Act of 1890 (*o*), even though the debt does not become actually payable until after the commencement of the sequestration (*p*). Where the defendant in an action pays money into Court in satisfaction with a denial of liability under Order 22, r. 6, *Rules of Supreme Court* 1884 (Judicature) and before the hearing becomes insolvent, the plaintiff is a secured creditor to the extent to which the claim in the action is admitted by the trustee in the defendant's insolvency (*q*).

Effect of  
garnishee order.

Effect of  
payment into  
Court.

Rules of proof as  
to secured  
creditors and  
redemption of  
security by  
trustee.

If a secured creditor realises his security he may prove for the balance due to him after deducting the net amount realised (*r*). R. 216 (*s*) provides that if a secured creditor surrenders his security to the trustee for the general benefit of the creditors he may prove for his whole debt. S. 122, Act of 1890, provides also that a creditor holding a specific security on the property of the insolvent or any part thereof may on giving up his security prove for his whole debt, and s. 67 (4) of the same Act is to the same effect, but has the words "previously to the meeting of creditors give up the security." By r. 270 it is also provided that if a secured

(*l*) *In re Whittles*, 18 V.L.R., 684; 14 A.L.T., 62. *Vide also In re Hallett, ex parte Cocks, Biddulph & Co.*, (1894) 2 Q.B., 256; 1 Manson, 83.

(*m*) *Ex parte Schofield, in re Firth*, 12 C.D., 337; but this appears to be contrary to *In re Bayldon, ex parte The Bank of Australasia*, 1 V.L.R. (1.), 10, and *In re Tucker*, 13 V.L.R., 551.

(*n*) *In re Potts, ex parte Taylor*,

(1893) 1 Q.B., 648.

(*o*) *Watson v. Morrow*, 6 V.L.R. (L.), 134; *Cairns v. Walsh*, 17 V.L.R., 44.

(*p*) *Ex parte Joselyne, in re Watt*, 8 C.D., 327.

(*q*) *In re Gordon, ex parte Navalchand*, 4 Manson, 141.

(*r*) R. 215—compare *Bankruptcy Act* 1883, 2nd Schedule (9).

(*s*) Compare *ibid*, 10.

creditor votes in respect of his whole debt he is deemed to have surrendered his security unless the Court on application is satisfied that the omission to value the security has arisen from inadvertance (t). CHAP. V.

If a secured creditor does not either realise or surrender his security he must, before ranking for dividend, state in his proof the particulars of his security, the date when it was given and the value at which he assesses it, and he is entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed (u), and where bills of exchange are held as collateral security, the creditor's debt being secured on the debtor's property, and the creditor seeks to prove on the covenant for payment in the mortgage deed, particulars of the bills must be specified in the proof as being "securities" within Form 75, Appendix, *post* (v). If the proof does not give the valuation it is invalid (w). An agent of the creditor can value the security (x). If the creditor is a joint creditor and he holds security over the separate estate of a partner he is within the rule which enables a creditor to prove for the full amount of his debt without giving up the security, when it is the property of a third person, the reason being that his security would not augment the joint estate, as it is a different estate. The converse case is also decided the same way (y).

If the creditor has different securities for the same debt he need not value them separately, but if he does and there is an excess realised upon one security and a deficiency upon the other the assignee or trustee is only entitled to the excess (if any) in the aggregate sum realised over the aggregate valuation (z). Debts and securities may be lumped in valuing, and it was also held in the case deciding so that the trustee may require any security to be separately valued, and that the creditor may call on the trustee to redeem a particular security (a).

Valuation where creditor has different securities.

(t) As to inadvertance *vide ante*, at p. 161; *Re and ex parte Piers*, (1898) 1 Q.B., 627; 5 Manson, 97; *Re King, ex parte Mesham*, 2 Morrell, 119.

(u) R. 217—compare *Bankruptcy Act* 1883, 2nd Schedule (11).

(v) *Re Ruthen, ex parte Kidd*, 5 Manson, 227.

(w) *Re Farrell*, 4 A.J.R., 101.

(x) *Re Evans*, 6 A.L.T., 249.

(y) *Ex parte West Riding, dec., Company in re Turner*, 19 C.D., at p. 113; *vide also Rolfe v. Flower*, L.R., 1 P.C., 27; *In re Stevenson*, 19 V.L.R., at p. 673.

(z) *In re Bayldon, ex parte The Bank of Australasia*, 1 V.L.R. (I.), 10.

(a) *Re Smith, ex parte Fletcher*, 2 Manson, 70.

## CHAP. V.

Trustee may  
redeem security.

Procedure of  
trustee if  
dissatisfied with  
assessment.

As to election by  
trustee to  
redeem.

Amendment of  
assessment.

Security  
assessed below  
what it may  
produce.

Security above  
what it  
realises.

Non-compliance  
with rules by  
secured  
creditor.

Where the security is valued as prescribed by r. 217, the trustee or assignee (as the case may be) may at any time redeem it on payment to the creditor of the assessed value (c). If the trustee is dissatisfied with the value at which a security is assessed he may require that the property comprised in any security so valued be offered for sale at such times and on such terms and conditions as may be agreed on between the creditor and the trustee, or as, in default of such agreement, the Court may direct. If the sale be by public auction the creditor or the trustee on behalf of the estate may bid or purchase (d). The creditor may at any time, by notice in writing, require the trustee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realised, and if the trustee does not within six months after receiving the notice signify in writing to the creditor his election to exercise the power he is not entitled to exercise it, and the equity of redemption or any other interest in the property comprised in the security which is vested in the trustee vests in the creditor, and the amount of his debt is reduced by the amount at which the security has been valued (e). Where a creditor has valued his security but has not voted or received a dividend he may at any time amend the valuation and proof on showing to the satisfaction of the trustee or the Court, that the valuation and proof were made *bond fide* on a mistaken estimate; but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court orders, unless the trustee allows the amendment without application to the Court (f). The creditor so proving is bound to pay over to the assignee or trustee, as the case may be, the amount which his security shall produce beyond the amount of such assessed value or amended valuation (g). The proof of any such creditor cannot be increased in the event of the security realising a less sum than the value at which he so assessed the same (h).

If a secured creditor does not comply with the rules above cited and referred to, that is rr. 215 to 220 inclusive, he is excluded

(c) R. 217 (a)—compare *Bankruptcy Act* 1883, 2nd Schedule 12 (a). Subject to the provisions of this rule it is provided by r. 222 that a creditor shall in no case receive more than twenty shillings in the pound and interest as provided by the Acts.

(d) *Ibid.*

(e) *Ibid.*

(f) R. 218—compare *Bankruptcy Act* 1883, 2nd Schedule (13).

(g) R. 219.

(h) R. 220.

from all share in any dividend (*i*), and by s. 122, Act of 1890, a creditor holding a specific security on the property of the insolvent, or any part thereof, is excluded from all share in the dividend unless he complies with the conditions in such section, namely, that he must give up his security before proving for his whole debt, and that he must either realize or give credit for the value of his security in manner and at the time prescribed before he is entitled to a dividend in respect to the balance of the debt.

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As to the particulars required in the proof on voting by secured creditors, *vide ante*, at p. 161, and there also s. 121, Act of 1897, is referred to as to voting in respect to any debt on or secured by a current bill of exchange or promissory note held by the creditor. Following such section in the Act referred to is s. 122, enabling the trustee, within twenty-eight days after a proof by or on behalf of any creditor estimating the value of a security as aforesaid, has been made use of in voting at any meeting, to require the creditor to give up the security for the benefit of all the creditors on payment of the value so estimated, and providing that where a creditor has put a value on such security he may, at any time before he has either been required to give up such security or exercised any rights or obtained any advantage by reason of his proof as aforesaid, correct such valuation by a new proof, and deduct such new value from his debt (*k*).

Particulars required as to proof on voting by secured creditors

Power of trustee to require security referred to in s. 121, Act of 1897, to be given up.

Correction of valuation.

As to secured creditors petitioning in compulsory sequestrations, *vide* Chapter IV., at p. 100, *ante*.

As to secured creditors in compulsory sequestrations.

Interest ceases to run after the date of sequestration, and a secured creditor cannot apply the proceeds of his security in payment of interest on his debt after the date of sequestration so as to increase his proof. The rule in bankruptcy is the same as in winding-up (*l*).

Interest after sequestration. Application of proceeds of security.

#### 4.—MUTUAL DEALINGS AND SET-OFF.

Where there have been mutual credits, mutual debts or other mutual dealings between the insolvent, and any other person

(*i*) R. 221.

(*k*) Ss. 121 and 122, Act of 1897, are adapted from the *Bankruptcy Act* 1883, 1st Schedule (11 and 12), and provisions therein immediately prior to these relate to creditors holding securities

other than such set out in s. 121.

(*l*) *In re Bonacino, ex parte Discount Banking Company*, 1 Manson, 59; *vide* also *In re London, &c., Hotels Company, Quartermaine's case*, (1892) 1 Ch., 639.

## CHAP. V.

proving or claiming to prove a debt under the sequestration, an account is directed to be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party must be set off against any sum due from the other party, and the balance of such account and no more can be claimed or paid on either side respectively (*m*). The object of this provision is to fairly adjust the position of the parties referred to where there is a debt due from the insolvent to a debtor of his estate and thus obviate the hardship of the debtor paying twenty shillings in the pound and receiving less. The enactment as to "mutual credits" is an old one (*n*). The expression "mutual debts and credits" was intended to comprise all ordinary transactions between the two persons in their individual capacities, the expression "mutual dealings" being added to get rid of any questions which might arise whether a transaction would end in a debt or not (*o*), the additional words giving a more extended right of set-off than previously existed. The words "mutual dealings" were added to the others for the first time by the *Bankruptcy Act* 1869. It was decided that "mutual credits" is a wider term than "mutual debts"; but that the credits must be such as either must terminate in debts or have a natural tendency to terminate in debts and must not be such as terminate in claims differing in nature from debts. The provision in its present shape, however, has been held applicable to all demands provable in bankruptcy and to include claims as well in respect of debts as of damages liquidated or unliquidated provided they arise out of contract (*p*), and a creditor is entitled as against the trustee of a deceased person's estate sequestrated under s. 113, Act of 1897, to set off against his indebtedness a debt due to him from the debtor although it has only ripened into a debt after the debtor's death (*q*).

Enactment  
absolute.

The enactment (*r*) is an absolute one, and being an especial

(*m*) S. 121, Act of 1890—compare 32 & 33 Vict., c. 71, s. 39.

(*n*) 5 Geo. II., c. 30.

(*o*) *Vide Peat v. Jones*, 8 Q.B.D., at p. 149.

(*p*) *Vide Palmer v. Day*, 2 Manson, at p. 389; *Peat v. Jones*, 8 Q.B.D., 147.

(*q*) *Watkins v. Lindsay*, 5 Manson, 25; 67 L.J. Q.B., 362. It was also held in this case that the doctrine established in the case of ordinary ad-

ministrations by *Rees v. Watts*, 11 Ex., 410; 25 L.J. Ex., 30; *Newell v. National Provincial Bank of England*, 1 C.P.D., 496; 45 L.J. C.P., 285; and *In re Gregson, Christison v. Bolam*, 36 C.D., 223; 57 L.J. Ch., 221, does not apply in the case of an administration in bankruptcy under the English section.

(*r*) S. 121, Act of 1890.



statutory law it overrides any agreement to the contrary existing between the parties at the commencement of the sequestration (s), and the fact that one party holds a lien on security for his debt will not affect its operation (t).

The right of set-off in insolvency depends upon the beneficial interest (u), and the claims should be mutual or as it has been put in favour of and against persons in the same rights, as for instance a debt due by an insolvent to a person acting for other persons cannot be set-off against a debt due to the insolvent in his own individual capacity (v). An exception to this is the case of an agent or factor, deemed to be the owner as contemplated by section 216, *Instruments Act* 1890, selling goods of an undisclosed principal as his own, as the person dealing with him has the right to consider him to all intents and purposes as the principal (w).

A joint debt cannot ordinarily be set off against a separate debt. Thus A. and B. are partners, C. is indebted to A. and B. jointly, B. is indebted to C. separately and becomes insolvent. The joint debt due to A. and B. by C. cannot be set off against the separate debt due by B. to C. (x). Or conversely a separate debt cannot be set off against a joint debt as such debts, accrue in different rights and are therefore not mutual. It has, however, been indicated that where the amount of the joint debt to which the defendant is entitled as between him and his partners is clear, the joint debt can be set off against a separate debt (y), and special circumstances may create an equity which will create an exception, as for example, if a joint creditor fraudulently conducts himself in relation to the separate property of one of the debtors and misapplies it, so that the latter is induced to act differently from what he would if he knew the facts, that will constitute a sufficient equity for a set-off of the separate debt against the joint debt (z),

(s) *Ex parte Fletcher*, in *re Vaughan*, 6 C.D., 350.

(t) *Ex parte Barnett*, in *re Devezé*, L.R. 9 Ch., 293.

(u) *London B. & M. Bank v. Narra-way*, L.R. 15 Eq., 93.

(v) *Fair v. M'Iver*, 16 East., 130. In this case the bankrupt's acceptance was held by the person seeking the set-off but it was in effect held in trust for others.

(w) *Vide George v. Clagett*, 7 T.R.,

359; 4 R.R., 462. *Vide also Turner v. Thomas*, L.R., 6, C.P., 610; *Ex parte Dixon*, in *re Hedley*, 4 C.D., 133; *New Zealand and Australian Land Company v. Watson*, 7 Q.B.D., 374.

(x) *In re Sloss*, *ex parte Robison Bros., &c., Limited*, 19 V.L.R., 710.

(y) *Ibid*, referring to *Ex parte Quinton*, 3 Ves., 248.

(z) Story, Eng. ed., 988.

**CHAP. V.** or where the facts establish that a joint credit was given on account of the separate debt the joint debt may in equity be set off against a separate debt (a), and where the joint debt is really a security only for a separate debt due to the estate from the person claiming the benefit of the set-off the separate debt from the estate can be set off against a joint debt to it (b).

Debts payable *in futuro* and *in presenti*.

The section applies though one debt is payable *in futuro* and the other *in presenti* as where a bill was accepted by the insolvent and discounted by the drawer at a bank at which the insolvent had an account the banker was entitled to set off the amount of the bill though still current against the sum to the credit of the insolvent (c). There may be a mutual credit where the parties did not intend to trust one another as by the endorsement of a bill a direct contract is constituted with the endorser and the acceptor (d), the principle being that credit is given to the acceptor by every person who takes the bill, as by accepting it he has engaged that he will pay the bill according to the tenor of the acceptance (e).

Mutual credit in cases where parties did not intend to trust one another.

Set-off must exist prior to sequestration.

As s. 114, Act of 1890, refers to a person proving or claiming to prove, and as all debts and liabilities provable must arise by reason of an obligation incurred previously to the date of sequestration, a creditor cannot alter the position in which he stood at sequestration by a transaction with some other person in order to put himself in a better position than the rest of the creditors, as it is impossible for a person who at the time of the bankruptcy owes a debt to the bankrupt and has no right of set-off to acquire such a right by taking an assignment of a debt due to a person by the bankrupt (f). If the trustee sue the creditor either under s. 96, Act of 1890, or otherwise, the creditor can obviously rely on the clause, but where the creditor receives money by way of fraudulent preference the claim does not apply and he cannot set off his debt in answer to an action by the trustee for the money as money had and received to the use of the assignee (g).

Set-off cannot be pleaded in answer to claim for money received by way of fraudulent preference.

(a) Story, Eng. ed., 989.

(b) *Ex parte Hanson*, 12 Ves., 348; 8 R.R., 335. In this case H. and W. at the time of the bankruptcy of C. and P. were indebted to them in a joint bond, the former as principal and the latter as surety and H. was a creditor on the firm on his separate account.

(c) *In re Morris and M'Murray*, 5

A.J.R., 157, 185.

(d) *Collins v. Jones*, 10 B. & C., 777; *Bolland v. Nash*, 8 B. & C., 105.

(e) *Instruments Act* 1890, s. 55.

(f) *In re Milan Tramways Company*, *ex parte Theys*, 25 C.D., at p. 592.

(g) *Courtney v. King*, 1 V.R. (L.), 70; and see also *In re Groves*, 6 W.W. & a.B. (I.), 36.

An insolvent contributory to a limited company can necessarily set off the debt due to him from the company against calls, but until sequestration the right does not arise in the event of the company being wound up, and therefore if the company is endeavouring to sequestrate his estate as for non-payment of calls he is not entitled to set off the debt due to him against the petitioning creditor's debt (*h*).

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Set off by insolvent contributories and as to company in liquidation.

If chattels are deposited with a creditor prior to the date of bankruptcy with authority to set them against his account the bare authority to sell under such circumstances if executed gives the creditor a right to set off the proceeds (*i*). And where a debt was due to auctioneers for their charges in a sale of property, and the debtor subsequently delivered to them certain goods as bailees, with authority to sell the same, and afterwards became bankrupt, it was held that the credit given by the auctioneers in respect to such charges, and the credit given by the debtor to the auctioneers in respect to the goods to be sold by them and the money realized, the authority not having been revoked, was a giving of credit to the auctioneers and constituted mutual dealings (*k*).

Set off as applied to deposit of goods.

#### DIVISION 4.

##### DISTRIBUTION OF ESTATE: BOOKS, ACCOUNTS AND AUDIT.

The trustee must, subject to the provisions of the Acts, pay and apply the proceeds arising from the collection, getting in and sale or mortgage of the insolvent estate in manner following (that is to say):—

Order of distribution.

- (I.) In payment of all taxed costs, charges, allowances, and expenses properly incurred by or payable by him in the execution of his office of trustee.
- (II.) In payment of the remuneration or commission allowed by the Acts.

(*h*) *In re Sloss, ex parte Robison Bros. Limited*, 19 V.L.R., 710.

Manson, 218.

(*i*) *In re Rose, ex parte Hasluck*, 1

(*k*) *Palmer v. Day*, 2 Manson, 386; (1895) 2 Q.B., 618.

## CHAP. V.

(III.) In payment of all preferential debts and sums of money directed or authorised by the Acts to be paid to creditors or others in priority to the general creditors, and if the estate be insufficient to meet such preferential debts and sums of money they must abate in equal proportions between themselves.

(IV.) In payment to and amongst all other creditors who have proved their debts rateably in proportion to the amounts of their respective proofs (*l*). The trustee must not declare any dividend until after the expiration of the prescribed time or such time as the Court or a judge may order (*m*).

R. 154 provides that subject to any order of the Court the assets in every matter remaining after payment of the actual expenses incurred in realising any of the assets of the debtor are liable to the payments therein set out and in the order of priority prescribed by the said rule. *Vide ante*, at p. 53. "In manner" means "in order" (*n*). The taxed costs of a voluntary sequestration are included in sub-s. (I.) and payable by the trustees thereunder in the execution of their office as such (*o*), in priority to payments to the assignee, sub-s. (II.), or for rent, sub-s. (III.) (*p*). Sub-s. I. also includes "contracts" entered into by the trustee resulting in claims for taxed costs, charges, allowances and expenses properly incurred, and also statutory obligations to pay not provided for by other sections, such as s. 40, Act of 1890, dealing with the payment of the costs of the petitioning creditors in a compulsory sequestration, nor by the remaining sub-sections of s. 123 (*q*). The costs of the petitioning creditor in a compulsory sequestration are payable out of the first money received by the trustee belonging to the estate, and there is an unqualified duty cast upon the trustee to reimburse the petitioning creditor out of such. S. 40 relates to the payment of the petitioning creditors' costs long before the estate is got in. S. 123 relates to the distribution of the estate after it has been got in (*r*).

The word "remuneration" refers to the payment the assignee

(*l*) S. 123, Act of 1890; s. 1, Act of 1897.

(*m*) S. 123, *ante*.

(*n*) *Re Greathead*, 8 A.L.T., at p. 132, and *vide Re Bower*, *ibid*, p. 159.

(*o*) *Re Greathead*, *ante*.

(*p*) *Ibid*.

(*q*) *Re Bower*, *ante*.

(*r*) *In re Stiles*, 16 A.L.T., at p. 210.

is entitled to under s. 54, Act of 1890, and also to the amount determined by the creditors under s. 53 (1) of the same Act to be paid to the trustee, in which latter case it is fixed as a rule by a commission of 5 per cent. on the gross amount of the assets realised. In the former case the amount is fixed by s. 54 upon the amount of the "gross assets" as therein set out. The word "assets" there has been interpreted to mean "assets realised," not "scheduled assets" (s), and where the only asset in the estate consists of land mortgaged the "gross asset" is the value of the right of redemption (t), that is the difference between the price realised on the mortgaged land and the amount of the mortgage (u).

Preferential debts contemplated by sub-s. (III.) are those such as (A) local rates due at the date of the order of sequestration, and having become due and payable within twelve months next before such time (v); (B) wages or salary of any clerk or servant in the employment of the insolvent at the date of the order of sequestration not exceeding four months' wages or salary and not exceeding £50; (C) all wages of any labourer or workman in the employment of the insolvent at the date of the order of sequestration and not exceeding four months' wages (w); (D) preferential claims of landlords (x), and (E) preferential claims in the case of apprentices and artied clerks (y). There are also other preferential claims which are dealt with in "Proofs of Debt," *ante*, at p. 286, *et seq.* In the case of a compulsory sequestration of a deceased person's estate any claim by the representative of the deceased person to the payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate is deemed a preferential debt and is payable in full out of the estate in priority to all other debts (z).

Priorities exist also among the residue of the creditors referred to in the fourth sub-section of s. 123, Act of 1890, as for instance, there may be two classes of creditors coming under this sub-section in an insolvent estate of a deceased person, as in the case of an executor carrying on the testator's business for a reasonable time

(s) *Re Greathhead*, *ante*.

(t) *In re Kauffman*, 17 A.L.T., 36.

(u) *In re Hayes*, *ibid*, 164; 1 A.L.R., 123.

(v) S. 115, Act of 1890.

(w) *Ibid*.

(x) S. 117, Act of 1897.

(y) S. 116, Act of 1890.

(z) S. 113 (3), Act of 1897.

**CHAP. V.** for its beneficial winding up with the assent of the testator's creditors, the new creditors, that is to say those persons who have become creditors during the winding up, have priority by virtue of the executor's right of indemnity against the whole estate over the testator's creditors whether the will contains a power to carry on the business or not (a). As to priority of creditors as to after-acquired property, *vide* Chapter V., Division 2, at pp. 214-216.

Disposal of insolvent's books and papers.

The Court may, on the application of the trustee, direct in what manner the debtor's books of account and other documents given up by him or any of them may be disposed of (b).

Declaration and distribution of dividends.

Subject to the retention of such sums as may be necessary for the costs of administration or otherwise the trustee must with all convenient speed declare and distribute dividends amongst the creditors who have proved their debts (c), but subject to the provisions of r. 217A a creditor must in no case receive more than twenty shillings in the pound and interest as provided by the Acts (d). The first dividend (if any) must be declared and distributed within four months after the order for sequestration unless the trustee satisfies the committee of inspection or the Court that there is or was sufficient reason for postponing the distribution to a later date (e). Subsequent dividends must in the absence of sufficient reason to the contrary be declared and distributed at intervals of not more than three months (f). Under a prior Act where the question of the admission of a proof was to be dealt with by appeal to the Privy Council the assignee was left to his own judgment as to paying any future dividends (g).

Prescribed limitation of time.

Advertisement of payment.

The trustee must cause notice to be given in the *Government Gazette* when and where dividends or moneys are payable to creditors interested in the insolvent estate (h) and in addition to such notice he must, before declaring a dividend, cause notice of his intention to do so to be advertised in one of the Melbourne daily newspapers and also in some local newspaper where the insolvent last carried on business or resided previous to insol-

(a) *In re Millard*, 2 Manson, 56; *vide* also *Dowse v. Gorton*, (1891) A.C., 190.

(b) R. 327.

(c) S. 42, Act of 1897. *Vide* also s. 123, Act of 1890.

(d) R. 222.

(e) S. 42, *ante*.

(f) *Ibid*.

(g) *Ex parte Rolfe, re Rutledge*, 2 W. & W. (I.), at p. 56.

(h) S. 126, Act of 1890.

vency, if not in Melbourne, and he must also send reasonable notice thereof in writing to each creditor mentioned in the insolvent's schedule or otherwise known to the trustee who has not proved his debt (*i*). Such notice must be so advertised not more than two months before declaring the dividend, and it must specify the latest date up to which proofs must be lodged, which must not be less than 14 days from the date of such notice (*j*). Under the corresponding English rule 232 it has been held that the notice in question did not prevent the creditor from making the claim after the time stated in the rule had expired (*k*). Where any creditor, after the date mentioned in the notice of intention to declare a dividend, appeals against the decision of the trustee rejecting a proof, such appeal must, subject to the power of the Court to extend the time in special cases, be commenced and notice thereof given to the trustee within fourteen days from the date of the notice of the decision against which the appeal is made, and the trustee must in such case make provision for the dividend upon such proof and the probable costs of such appeal in the event of the proof being admitted; and where no appeal has been commenced within such specified time the trustee must exclude all proofs which have been rejected from participation in the dividend (*l*). Immediately after the time so fixed as stated for appealing against the decision of the trustee, he must proceed to declare a dividend and must send a notice of same to each creditor whose proof has been admitted accompanied by a statement according to form No. 93, Appendix, *post*, showing the position of the estate (*m*). The respective notices must be in the forms Nos. 91, 92, and 96, Appendix, *post*, with such variations as circumstances may require (*n*). S. 42 (6), Act of 1897, also provides that when the trustee has declared a dividend he must send to each creditor who has proved a notice in writing showing the amount of the dividend and when and how it is payable and a statement in the prescribed form as to the particulars of the estate.

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Provision in case of creditor appealing as to rejection by trustee of a proof.

Form of statement accompanying notice of dividend.

Forms of Gazette notice and notices of dividend.

Before declaring a dividend the trustee must file with the chief clerk a statutory declaration that he has complied with the

Statutory declaration of trustee.

(i) S. 42, *ante* (4); and *vide* r. 241.

(j) R. 241.

(k) *In re Shepherd, ex parte Whitehaven Mutual Insurance Society*, 4

Morrell, 130.

(l) R. 241 (2).

(m) *Ibid* (3).

(n) *Ibid* (4).

CHAP. V. provisions of sub-s. 4 of s. 42, Act of 1897, and thereupon the chief clerk must by cheque drawn upon the "Insolvency Estates Account" pay into such bank as he may select in the name of the trustee as trustee in insolvency of the particular estate a sum sufficient to cover the dividend proposed to be declared and thereupon the trustee must declare the dividend (o). The trustee must also, prior to the declaration of a dividend, prepare a list of all proofs admitted, and such list must be in the form No. 94 or 95, Appendix, *post*, and must be transmitted to the chief clerk (p).

Forms of  
certified list of  
proofs filed.

Payment of  
dividends.

The payment of dividends are in every instance, except where a local bank has been selected by the creditors, made by cheques on the "Insolvency Estates Account." The creditors in the list are to be numbered consecutively and corresponding numbers affixed to the cheques (q). If the dividend has been paid by cheques on the "Insolvency Estates Account" the trustee, on the expiration of six months from the date of issue or on application for his release if that event occurs earlier, must forward to the official accountant any cheques remaining in hand (r). If the dividend has been paid through a local bank the trustee must at the expiry of six months from the date of the declaration of a dividend forward to the official accountant for audit vouchers for the dividends paid and a list of those remaining unclaimed, and within forty-eight hours thereafter pay into the insolvency unclaimed dividend fund the amount of the dividends unclaimed. Under no circumstances are unclaimed dividends to be credited to the estate (s). The total amount of the dividend payable must be charged in the estate cash-book in one sum (t). If it becomes necessary in the opinion of the trustee and committee of inspection (if any) to postpone the declaration of the dividend beyond the prescribed limit of two months the trustee must cause a fresh notice of his intention to declare a dividend to be advertised in the *Government Gazette* and in one of the Melbourne daily newspapers and also in some local newspaper where the debtor last carried on business or resided previous to sequestration if not in Melbourne, but it is not necessary for the trustee to give a fresh notice to such of the creditors mentioned in the debtor's schedule

Postponement  
of dividend.

(o) S. 42 (5), Act of 1897.  
(p) R. 244.  
(q) R. 245.

(r) R. 247.  
(s) R. 248.  
(t) R. 246.



or statement of affairs as have not proved their debts. In all other respects the same procedure follows the fresh notice as would have followed the original notice (u). CHAP. V.

Subject to the provisions of s. 71 of the *Instruments Act* 1890, and subject to the power of the Court in any other case on special grounds to order production to be dispensed with, every bill of exchange, promissory note or other negotiable instrument or security upon which proof has been made must be exhibited to the trustee before payment of a dividend thereon, and the amount of the dividend paid must be indorsed on the instrument (v). The section of the *Instruments Act* 1890 referred to provides that in any action or proceeding upon a "bill" the Supreme Court or a judge thereof may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the Court or judge against the claims of any other person upon the instrument in question. Production of bills, notes, &c.

Where the trustee has realised all the property of the insolvent, or so much thereof as can in the joint opinion of himself and of the committee of inspection (if any) be realised without needlessly protracting the trusteeship, he must declare a final dividend, but before doing so he must give notice in manner prescribed to the persons whose claims to be creditors have been notified to him but not established to his satisfaction that if they do not establish their claims to the satisfaction of the Court within a time limited by the notice he will proceed to pay a final dividend without regard to their claims. After the expiration of the time so limited, or if the Court on application by any such claimant grant him further time for establishing his claim then on the expiration of such further time, the property of the insolvent is divided among the creditors who have proved their debts without regard to the claims of any other persons (w). Notice of intention to declare a final dividend is in the form No. 97, Appendix, *post* (x). Final dividend.

The amount of the dividend may at the request and risk of the creditor be transmitted to him by post (y). In the calculation and distribution of a dividend the trustee must make provision Notice of final dividend.

(u) R. 241 (5)—compare r. 232, *Bankruptcy Rules* 1886. 62. *Bankruptcy Act* 1883.

(v) R. 242—compare r. 233, *ibid*.

(w) S. 47, *Act of 1897*—compare s.

(x) R. 249.

(y) R. 243.

Dividend may be sent by post.

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Provision for  
creditors  
residing at a  
distance by the  
trustee.

By the Court.

for debts provable in the insolvency appearing from the insolvent's statements or otherwise to be due to persons resident in places so distant from the place where the trustee is acting that in the ordinary course of communication they have not had sufficient time to tender their proofs or to establish them if disputed and also for debts provable in the insolvency the subject of claims not yet determined. He must also make provision for any disputed proofs or claims and for the expenses necessary for the administration of the estate or otherwise and subject to the foregoing provisions he must distribute as dividend all money in hand (z). Where a secured creditor has neither valued nor realised his security the trustee need not, it has been held, make any reserve in respect to the amount which may eventually become provable by such creditor (a). S. 111, Act of 1890 (b), also provides that when by reason of the absence of any person from Victoria or for any other cause the Court shall be of opinion that a claimant who has not proved his debt may eventually be able to establish the same, the Court may allow such claim to be entered in the proceedings in the insolvent estate and may give reasonable time for proving the same and in the meantime may make such order for securing the amount thereof in case the claim is afterwards established as the Court thinks fit.

Right of creditor  
who has not  
proved debt  
before  
declaration of  
dividend.

Any creditor who has not proved his debt before the declaration of any dividend or dividends is entitled to be paid out of any money for the time being in the hands of the trustee any dividend or dividends he may have failed to receive before that money is applied to the payment of any future dividend or dividends but he is not entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein (c). S. 112, Act of 1890 (d), also enacts that any debt provable in insolvency may be proved at any time before the final distribution of the estate, but when any debt is so proved after any dividend has been paid to the creditors such dividend is not in any way disturbed or affected by or in respect of any such debt but such creditor shall receive payment of his

(z) S. 45, Act of 1897—compare s. 60, *Bankruptcy Act* 1883.

(a) *Ex parte Good, re Lee*, 14 C.D., 82.

(b) Compare s. 42, *Bankruptcy Act*

1869.

(c) S. 46, Act of 1897—compare s. 61, *Bankruptcy Act* 1883; s. 43, *Bankruptcy Act* 1869.

(d) Compare *ibid*.

debt out of the future assets of the estate in the same proportion as the other creditors shall have already received and shall afterwards receive payment. CHAP. V.

It has been held, under the Act of 1890, that a creditor is entitled to share in dividends from the time his proof is delivered to the assignee or trustee unless the proof is rejected or expunged. On receipt of the proofs the trustee should retain in his hands a sum sufficient to meet claims on such which may or may not be established, and if without doing so he divides all the collected proceeds amongst the creditors whose proofs have been admitted he acts at his own risk, and he will be liable to pay a creditor whose proof is subsequently admitted (*e*). The trustee may declare and distribute the dividend without regard to any claim of a person against the estate who has not complied with the trustee's request to deliver his bill of costs or charges to the chief clerk for taxation within ten days after receipt of the request or such further time as the Court may on application grant and in such a case the claim is forfeited as well against the trustee personally as against the estate (*f*).

Right of creditor where proof admitted.

Liability of assignee or trustee.

Declaration of dividend as to forfeited taxable claims against the estate.

No action for any dividend lies against a trustee, but if the trustee neglects or refuses to pay any dividend the Court may if it thinks fit order him to pay it and also to pay out of his own money interest thereon for the time that it is withheld at such rate as the Court may fix, and the costs of the application (*g*). The form of application by the creditor for the order to pay the dividend withheld, and order thereon is form 98, Appendix, *post*. Where the trustee obtained his release in a liquidation under the *Bankruptcy Act* of 1869, he was nevertheless ordered to pay a dividend unpaid by him as he had money in his hands for the use of the claimant, but it was held otherwise where the money was not in the trustee's hands (*h*).

No action for dividend.

As to dividends withheld by trustee.

All dividends in insolvent estates administered under the provisions of the Act of 1890, unless the Court otherwise orders,

"Insolvency Unclaimed Dividend Fund."

(*e*) *Re Benness*, 16 V.L.R., at p. 699.

(*f*) S. 27 (4), Act of 1897—compare s. 73 (4), *Bankruptcy Act* 1883.

(*g*) S. 48, Act of 1897—compare s. 63, *Bankruptcy Act* 1883.

(*h*) *Re Prager, ex parte Societie Cockrill*, 3 C.D., 115; *Ex parte Carter, re*

*Ware*, 8 C.D., at p. 735.

(*i*) S. 127, Act of 1890—compare 12 & 13 Vict. c. 106, s. 191. As to dividends in the hands of assignees at the passing of the Act of 1890, *vide* same section.

**CHAP. V.** which are unclaimed by the parties entitled thereto for the space of six months next after the same are payable must be paid into the Treasury to the credit of the "Insolvency Unclaimed Dividend Fund" (i).

Unclaimed dividends to be paid into Unclaimed Dividend Fund.

All the dividends in insolvent estates in the hands of any assignee or trustee at the commencement of the Act of 1897 and which have not been claimed by the parties entitled thereto for the space of six months next after the same have been or are payable must, unless the Court otherwise orders, be paid into the Insolvency Unclaimed Dividend Fund to be dealt with as to principal and interest as provided in s. 127, Act of 1890. All dividends in estates administered or partly administered under the provisions of the Insolvency Acts which are unclaimed by the parties entitled thereto for the space of six months next after the same are payable must, unless the Court otherwise orders, be paid into Her Majesty's Treasury to the credit of the same fund to be dealt with as to principal and interest as in such section provided. The words "insolvent estates" and "estates" include not only estates in insolvency but also estates in liquidation by arrangement under s. 153, of Act of 1890 (k).

Pleading of Statute of Limitations by trustees.

In considering s. 8 of the *Trustee Act* 1888, 51 & 52 Vict. c. 59, permitting the *Statute of Limitations* to be pleaded by trustees, which is to the same effect as s. 29 of the *Trusts Act* 1896, it was held that such section has no application to a trustee in bankruptcy (l).

Court may order trustee to furnish account of money available for fund and may direct and enforce audit.

The Court may at any time order any assignee or trustee to submit to it an account verified by affidavit of all dividends or sums available for dividends in insolvent estates which are payable or which ought to be paid or which have been paid into Her Majesty's Treasury pursuant to the provision of s. 127, Act of 1890, and may direct and enforce an audit of the account and payment of any unclaimed or undistributed moneys arising from the property of the insolvent in the hands or under the control of the trustee into the "Insolvency Estates Account" in accordance with the provisions of the Insolvency Acts and the costs of any such account and the audit and the enforcement thereof is in the discretion of the Court. This provision does not deprive any

(k) S. 60, Act of 1897.

*Trade*, (1896) 1 Q.B., 99.

(l) *In re Cornish, ex parte Board of*

person of any larger or any other right or remedy to which he may be entitled against such assignee or trustee (*m*). The Board of Trade has a similar power under the section of the English Act from which this provision is adopted and under such provision it has been held that the order can be enforced for an account against the trustee without proving that he has had in his hands after the passing of the Act any unclaimed or undistributed funds or dividends (*n*).

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The Governor-in-Council may direct that all sums paid to the credit of the "Insolvency Unclaimed Dividend Fund" be invested in debentures of the Government of Victoria and the interest arising from such investment be paid to the credit of a fund called the "Insolvency Suitors' Fund" (*o*).

Investment of money in said fund.

Any person entitled to receive any dividends directed to be paid into the said "Insolvency Unclaimed Dividend Fund" may apply to the Court for payment of such dividends to him and the Court may order such dividends to be paid to him and upon every such order the Governor issues his warrant for the payment of the amount specified in such order and the Treasurer of Victoria pays the same out of the said fund (*p*).

Payments out of "Insolvency Suitors' Fund."

An application under s. 127, Act of 1890, for payment out of the "Insolvency Unclaimed Dividend Fund" of any sum to which any person claims to be entitled must be supported by the affidavit of the claimant and such further evidence as the Court may require (*q*).

As to the defrayment of costs out of the "Insolvency Suitors' Fund," *vide* "Costs and Fees," *ante*, at p. 59.

For the purposes of s. 127, Act of 1890, and s. 60, Act of 1897, the official accountant may at any time require the trustee under any insolvency, liquidation or composition to submit to him an account verified by affidavit of the sums received and paid by him under or in pursuance of any such insolvency, liquidation or composition, and may apply to the Court for an order directing

Accounts by trustee of unclaimed funds.

(*m*) S. 57, Act of 1897—compare s. 162, *Bankruptcy Act* 1883.

(*n*) *In re Cornish, ex parte Board of Trade*, (1895) 2 Q.B., 634; 2 Manson, 500, affirmed (1896) 1 Q.B., 99. As to obtaining an account from the trustee

after his discharge or release, *vide Re Chudley, ex parte Board of Trade*, 14 Q.B.D., 402.

(*o*) S. 127, Act of 1890.

(*p*) *Ibid*.

(*q*) R. 447.

**CHAP. V.** the trustee to pay any unclaimed or undistributed moneys arising from the property of the debtor in the hands or under the control of such trustee into the "Insolvency Unclaimed Dividend Fund" in accordance with the terms of the said sections of the said Acts; the costs of such application are in the discretion of the Court (*r*).

Payment of  
percentage to  
Treasury.

There must out of every estate being administered after the commencement of the Act of 1897 be paid into the Treasury of Victoria towards the expenses of administering the Insolvency Acts such sum not less than one-eighth of a pound, or not exceeding one pound per centum on the net produce from time to time of any such estate, and a scale within the limits aforesaid, and the time or times of payment may be fixed and varied from time to time by any regulations of the Governor-in-Council, and such regulations must within ten days after the making thereof be laid before both Houses of Parliament, or if Parliament be not then sitting, then within ten days from the date of its meeting. Every such payment must be made by the chief clerk, the assignee or trustee as the Court directs. "Estate administered" includes estate in insolvency or in liquidation by arrangement, a composition with creditors under Part IX. of the Act of 1897, and property assigned by or dealt with under a deed of arrangement as defined by the Act of 1897, and made after the commencement of the same (*s*). (1) The percentages in the subjoined scale are from and after the 1st day of January, 1898, the percentages to be paid under the sections referred to, and (2) such percentages must be paid into the Treasury of Victoria on the first day of every month in every year.

#### SCALE OF PERCENTAGES (*t*).

On the first £1,000 or fraction thereof	...	£1	per cent.
„ next £1,500	„ „	...	17s. 6d. „
„ „ £2,500	„ „	...	15s. „
„ „ £5,000	„ „	...	12s. 6d. „
„ all further sums	... ..	...	10s. „

The percentages must be paid in to the Treasury by the trustee (*u*).

(*r*) R. 448.

(*s*) S. 118, Act of 1897; s. 2, Act of 1898.

(*t*) *Government Gazette*, 25th March, 1898, p. 1131.

(*u*) R. 460.

The primary principle of the distribution of partnership estate is that the joint estate is applicable in the first instance in payment of the joint debts and the separate estate of each partner is likewise applicable in the first instance in payment of the separate debts. If there is a surplus of the separate estates it is dealt with as part of the joint estate, and if there is a surplus of the joint estate, it is dealt with as part of the separate estates in proportion to the right and interest of each partner in the joint estate. This is a principle of English bankruptcy law which has been acted on for many years, and it can be traced back to the time of Lord King in the case of *Ex parte Cook* (v), and it was subsequently embodied in Lord Loughborough's order of the 6th March, 1794. This order was repeated in r. 76 of the rules made under the *Bankruptcy Act* 1869, and the r. 76 referred to was adapted in the *Insolvency Rules* of 1890, by r. 87. R. 87 has been repealed and possibly from inadvertence it has not been re-enacted in the Rules of 1898. S. 44 of the Act of 1897, and the r. 326 bearing on the distribution of partnership property dealt with below are supplementary to this principle, and had it been enacted in the form of a section (w), or set in the form of a rule, the effect would have been apparently to have embodied the law as it stands (x). There are four cases or exceptions which do not fall within the principle:—

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Distribution of  
partnership  
estate.

1. That of a joint creditor petitioning and obtaining the sequestration of a member of a firm.
2. Where there is no joint estate and no solvent partner who can be sued.
3. Where the property of the firm has been fraudulently converted.
4. Where there has been a distinct separate trade in respect of which a separate debt has been contracted.

These exceptions are dealt with in respect to proofs of debt at p. 298, *et seq.*, *ante*, and the fact that the principle has been

(v) 2 P. Wms., 500; *vide In re Budgett, Cooper v. Adams*, (1894) 2 Ch., 557.

(w) As it now is in England by s. 40

(3), *Bankruptcy Act* 1883.

(x) *Vide In re Budgett, Cooper v. Adams, ante.*

CHAP. V. enacted by the English section referred to in note (w) does not do away with such exceptions (y).

S. 44, Act of 1897.

Joint and separate dividends.

Where the estate of one partner of a firm is sequestrated a creditor to whom the insolvent is indebted jointly with the other partners of the firm or any of them cannot receive any dividend out of the separate estate of the insolvent until all the separate creditors have received the full amount of their respective debts and where joint and separate estates are being administered dividends of the joint and separate estates subject to any order to the contrary that may be made by the Court on the application of any person interested must be declared together and the expenses of and incident to such dividends must be fairly apportioned by the trustee between the joint and separate estates, regard being had to the work done for and the benefit received by each estate (z); and where an order of sequestration has been made against debtors in partnerships, distinct accounts must be kept of the joint estate and of the separate estate or estates and no transfer of a surplus from a separate estate to the joint estate on the ground that there are no creditors under such separate estate can be made until notice of the intention to make such transfer has been published in the *Government Gazette* and in one of the Melbourne daily newspapers and in some local newspaper when the proceedings are not being prosecuted in Melbourne (a). The form of notice is No. 90, Appendix, *post*.

R. 326.

Joint and separate estate accounts.

Costs out of joint and separate estates.

Where the joint estate of any co-debtors is insufficient to defray any costs or charges properly incurred prior to the appointment of the trustee, the trustee may pay such costs or charges out of the separate estates of such co-debtors or one or more of them in such proportions as in his discretion the trustee may think fit. The trustee may also pay any costs or charges properly incurred prior to his appointment for any separate estate out of the joint estate or out of any other separate estate and any part of the costs or charges of the joint estate incurred prior to the appointment of the trustee which affects any separate estate out of that separate estate (b), and where the joint estate

(y) *In re Carpenter, ex parte Besley*, 7 Morrell, 270. *In re Budgett, Cooper v. Adams, ante*.

(z) S. 44, Act of 1897—compare s. 59, *Bankruptcy Act* 1883.

(a) R. 326—compare r. 293, *Bankruptcy Rules* 1886.

(b) R. 157 (1) and (2)—compare *Bankruptcy Rules* 1886, r. 128.



of any co-debtors is insufficient to defray any costs or charges properly incurred after the appointment of the trustee, the trustee with such consent as is hereinafter mentioned may pay such costs or charges out of the separate estates of such co-debtors or one or more of them. The trustee with the said consent may also pay any costs or charges properly incurred for any separate estate after his appointment out of the joint estate and any part of the costs or charges of the joint estate incurred after his appointment which affects any separate estate out of that separate estate. No such payment can be made out of a separate estate or joint estate by a trustee without the consent of the committee of inspection of the estate out of which the payment is intended to be made (if any) or if there be no committee or if such committee withhold or refuse their consent without an order of the Court (b), and by r. 156, adapted from r. 127, *Bankruptcy Rules* 1886, it is provided that in the case of an insolvency petition by or against a firm or partnership, the costs payable out of the estates incurred up to and inclusive of the close of the meeting for the election of trustee shall be apportioned between the joint and separate estates in such proportions as the assignee or trustee as the case may be may in his discretion determine.

Apportionment  
of costs in case  
of partnership.

If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last-mentioned firm are deemed to be a separate set of creditors and to be on the same footing as the separate creditors of any individual member of the firm. And where any surplus arises upon the administration of the assets of such separate or independent firm, the same must be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein (c).

Administration  
as to separate  
firms.

Joint estate consists of all property, rights and interests in property originally brought into the partnership stock or acquired whether by purchase or otherwise, on account of the firm or for the purposes and in the course of the partnership business (d). The legal estate or interest in any land which belongs to the partnership devolves according to the nature and tenure thereof

Joint estate,  
meaning of.

(b) R. 157 (1) and (2)—compare *Bankruptcy Rules* 1886, r. 128.

(c) R. 290—compare *Bankruptcy Rules* 1886, r. 289.

(d) *Vide Partnership Act* 1891, s. 24 (1)—compare 53 & 54 Vict. c. 39, s. 20.

CHAP. V. and the general rules of law thereto applicable but in trust so far as necessary for the persons beneficially interested therein (e).

Where co-owners of an estate or interest in any land not being itself partnership property are partners as to profits made by the use of the land or estate and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them in the absence of an agreement to the contrary not as partners but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase (f), and unless the contrary intention appears property bought with money belonging to the firm is deemed to have been bought on the account of the firm (g).

Joint estate would also include property divisible by the Acts amongst the creditors, such as property in the reputed ownership of the firm and the other descriptions of property comprised in sub-ss. 3 and 4, s. 70, Act of 1890.

Separate estate. Separate estate likewise includes property divisible amongst the creditors as contemplated by the Acts as well as that property which as between the partners belong to each of them individually.

Conversion of joint estate into separate estate and vice versa.

As unsecured creditors have no lien on the property of a debtor, partners can convert joint estate into separate estate and vice versa by agreement between them. Such agreements are binding on the joint creditors, and the respective separate creditors and consequently on the trustee when they are *bona fide* and not executory (h).

Distribution of deceased persons' and trust estates.

The estate, real or personal of any person deceased whose estate is sequestrated by his or her representative, and estates in trust for creditors, are distributed and administered upon the same principles and in the same way as other estates (i).

Trustee of deceased persons' estate may apply for order to vest real estate.

The trustee of an estate sequestrated by the executor or administrator of any person deceased may after the whole of the

(e) *Partnership Act* 1891, s. 24 (2).

(f) *Ibid.*, s. 24 (3).

(g) *Ibid.*, s. 25.

(h) *Ex parte Williams*, 11 Ves., 3;

8 R.R., 62, confirming *Ex parte Ruffin*, 6 Ves., 119; 5 R.R., 237; vide also *Ex parte Butcher*, re *Mellor*, 13 C.D., 465.

As to the agreement being *bona fide*, vide *Ex parte Rowlandson*, in re *Ansell*, 1 Rose, 416, and as to its being not executory, vide *Ex parte Wood*, in re *Wright*, 10 C.D., 554.

(i) Ss. 35, 102, Act of 1890.

personal estate has been administered if the same be not sufficient to pay the debts proved and provable against such estate apply to the Court upon notice to the persons to whom the real estate of the deceased may have descended or been devised for an order vesting such real estate in the trustee for the purpose of distribution amongst the creditors of the deceased, and the Court may make such order and thereupon such real estate vests in the trustee for the whole estate of the persons served and the same is realized and distributed in the same manner as the real estate of any insolvent (*k*). Ss. 6 and 7 of the *Administration and Probate Act* 1890, vest the real estate of a deceased person as from the death of such person in the executor or administrator and makes it assets for the payment of debts on probate or administration being granted, and on sequestration the same would vest in the trustee under the insolvency without the order of the Court referred to, but as to real estate under the *Transfer of Land Act* 1890, of which the executor is not registered, that Act requires an application by the executor to be registered to be made by him in writing (*l*). In the case of the executor's omission or refusal to apply to be registered, the provisions of s. 100, Act of 1890, could be resorted to.

As the estate of a deceased person when sequestrated is distributed and administered on the same principles as that of a living person the right of an executor to retain his own debt in preference to the other creditors ceases on sequestration (*m*), and by s. 8 (1) of the *Administration and Probate Act* 1898, every person who obtains probate of the will or administration of the estate of a deceased person must pay all and singular the just debts of deceased in due course of administration rateably and proportionably and according to the priority required by law but without preferring his own debt by reason of his having obtained such probate of the will or administration.

Executor's  
right of retainer

The trustee must keep in the prescribed manner proper books in which he must from time to time make or cause to be made entries or minutes of proceedings at meetings and of such other matters as the rules direct and any creditor of the insolvent may, subject to the control of the Court, personally or by his agent,

Trustee to  
keep books.

(*k*) S. 100, Act of 1890.

(*l*) S. 193, *Transfer of Land Act*.

(*m*) *Vide* Snell's Principles of Equity, 9th ed., at p. 330.

**CHAP. V.** inspect such books (n). The trustee must keep a book called the "Record book" in which he shall record all minutes, all proceedings had and resolutions passed at any meeting of creditors, except the general meeting under s. 53, Act of 1890, or of the committee of inspection and all such matters as may be necessary to give a correct view of his administration of the estate, but he is not bound to insert in the record any document of a confidential nature (such as the opinion of counsel on any matter affecting the interest of the creditors), nor need he exhibit such document to any person other than a member of the committee of inspection (o).

**The Cash book.** The trustee must keep a book called the "Cash book" according to the form No. 37 in the Appendix, *post*, in which he must enter from day to day each receipt and payment made by him in such detail as will fully explain its nature. Payments for rents, salaries, wages, &c., due at the date of sequestration or liquidation by arrangement must be entered under the head of preferential payments and carefully distinguished from similar payments which may arise or become necessary while carrying on trade. All bank transactions, whether with local banks or insolvency estates account, must be duly entered in bank columns, save only when local banks are used for purposes of transmission to the insolvency estates account, in which case the payments to the latter account alone should appear in the bank columns (p). All moneys received by a trustee whether a special banking account has been authorised or not must be entered in the trustee's general cash book and appear in his general account (q). The cash book must record the actual dates on which all moneys are received on account of an estate and the payments out must be entered under the date when cheques are issued except in the case of dividends which must be entered as of the date when the cheques are received (r).

Directions as to  
same when  
carrying on  
business.

Where the trustee carries on the business of the insolvent he must keep a distinct account of the business, and must incorporate in the books kept by him, so as to be easily discernible, the total weekly amount of the receipts and payments on account of

(n) S. 82, Act of 1890.  
(o) R. 316.  
(p) R. 317.

(q) R. 378.  
(r) R. 318.

such business accounts (*s*). As to forms, *vide* Nos. 101, 102, 104, Appendix, *post*. The business account must from time to time and not less than once in every month be verified by a statutory declaration of the trustee and the trustee must submit such account to the committee of inspection if any, or such number thereof as may be appointed by the committee for that purpose (*t*). When required, and not less than once every three months, the trustee must submit his books and vouchers to the committee of inspection (if any) (*u*). As to control of books by Court, *vide ante* at p. 163, 176-7, and as to control by, and powers of official accountant, *vide* "Official Accountant," *ante* at p. 189, *et seq*.

Control of books.

The trustee must submit the Record book and Cash book, together with any other requisite books and vouchers to the committee of inspection (if any) when required, and not less than once every three months, and to the judge or official accountant when required (*v*). The committee of inspection (if any) shall not less than once every three months audit the cash-book and certify therein under their hands the day on which the said book was audited. The certificate must be in the form No. 100 in the Appendix, *post*, with such variations as circumstances may require (*w*).

Audit of Record and Cash books.

Form of certificate of audit.

Every trustee must at the expiration of six months from the date of his appointment and at the expiration of every succeeding six months thereafter transmit to the official accountant the record book, together with any original resolutions of the creditors or committee of inspection not entered in the Record book and a duplicate copy of the Cash book for such period verified by affidavit, together with the vouchers for all payments and allocations for taxable charges and copies of the certificates of audit by the committee of inspection (if any). He must also forward with the first accounts one office copy of lists A., D., E., and F. of the insolvent's schedule or of sheets B., C., F., G., and H. of the debtor's statement of affairs showing therein respectively in red ink the amounts realised and explaining the cause of the non-realisation of such assets as may be unrealised (*x*).

Audit by official accountant.

(*s*) S. 62 (1), Act of 1897; r. 360—compare r. 303, *Bankruptcy Rules* 1886.

(*t*) S. 62 (2), *ante*; r. 360. A form of affidavit verifying trading account is given in No. 103, Appendix, *post*.

(*u*) S. 58, Act of 1897.

(*v*) R. 319.

(*w*) R. 320.

(*x*) R. 321.

## CHAP. V.

Report of trustee as to position of estate.

Accounts to be sent to official accountant and verified.

Affidavit of no receipts.

Power of creditors to select a bank for estate.

Retention of moneys from bank account.

The trustee must also at each audit forward to the official accountant a report on the position of the estate (x).

When the estate has been fully realised and distributed, the trustee must forthwith send in his accounts to the official accountant although the six months may not have expired. The accounts sent in by the trustee must be certified and verified by him according to the form No. 99 in the Appendix, *post* (x). When the trustee's account has been audited the official accountant must certify that the account has been duly passed and thereupon the duplicate copy bearing a like certificate must be transmitted to the chief clerk, who must file the same with the proceedings in the sequestration (y).

Where a trustee has not since the date of his appointment or since the last audit of his accounts, as the case may be, received or paid any sum of money on account of the debtor's estate he must at the period when he is required to transmit his estate account to the official accountant forward to the official accountant an affidavit of no receipts or payments (z). Where at the first audit an affidavit of no receipts or payments is furnished the trustee must forward therewith a copy of the assignee's account of receipts and payments as shown by the estate Cash book on transfer to the trustee (a).

The creditors by ordinary resolution may direct that the assignee or trustee of any estate keep an account in the name of such estate in such bank as is named in such resolution, and may authorise the said assignee or trustee to pay into such bank to the credit of such account all moneys received by him in such estate, and out of such account to pay by cheque all payments to be made by him on account of such estate, and any interest receivable in respect of the said bank account is part of the assets of the estate (b). If any assignee or trustee at any time retains for more than ten days in his own hands, and without paying the same into the said bank account any money belonging to the estate then unless he explains the retention to the satisfaction of the Court he must pay interest on the amount so retained at the rate of twenty pounds per centum per annum, and he has then

(x) R. 321.

(y) R. 322.

(z) R. 323.

(a) R. 324.

(b) S. 53, Act of 1897; *vide* also s. 89, Act of 1890.

no claim for remuneration, and may be removed from his office, and is liable to pay any expenses occasioned by his default (b). CHAP. V.

Where the creditors have directed the trustee to keep an account in a bank in the manner referred to, or where the trustee is authorised by the Court to have an account with a bank, such account must be opened and kept by the trustee in the name of the insolvent's or debtor's estate, and he must pay all moneys received by him into such bank to the credit of the estate (c). All payments out of such bank, and out of any bank account must be made by cheque payable to order, and every cheque must have marked or written on the face of it the name of the estate, and must be signed by the trustee and countersigned by at least one member of the committee of inspection, and by such other person, if any, as the creditors or the committee of inspection or the Court may appoint (c). The trustee must bank all collections daily, and a book initialled by the bank-teller showing the nature of the deposits must be kept for reference (d). Post office orders must not be cashed, but must be shown in the bank deposits (d). Payments into and out of bank.

Until a resolution under s. 53 (1), Act of 1897, with regard to the moneys received in an estate is passed by the creditors the assignee or trustee must comply with the provisions of s. 54, Act of 1897 (e), as follows:—An account called “The Insolvency Estates Account ——— District” with the name of the district in which the account is opened, prefixed to the word “district” must be kept by the chief clerk with such bank or banks as the Treasurer of Victoria may from time to time direct. Every assignee and every trustee must in such manner and at such times as may be prescribed and at least once in every week pay into a bank in which such account is kept as aforesaid and to the credit of such account all moneys received by him as assignee or trustee and must forthwith deliver to the chief clerk the voucher of the bank for the moneys so paid in, together with a detailed statement of the amount so paid in, in each estate of which he is assignee or trustee, and the chief clerk must furnish a receipt for such vouchers. Whenever it appears to the Court to be necessary for the purpose of carrying on the insolvent's business or to meet “ Insolvency Estates Account.”  
Payments into such account.  
Order for urgent payments by Court.

(b) S. 53, Act of 1897; *vide* also s. 89, Act of 1890.

(c) R. 376; s. 43, Act of 1897.

(d) R. 377.

(e) S. 53, Act of 1897.

**CHAP. V.** any urgent claims properly incurred by the assignee or trustee in any estate the Court may, upon the written application of the assignee or trustee, order such payments out of the amount standing to the credit of such estate in the Insolvency Estates Account as shall appear to the Court to be necessary; and where upon the written application of the assignee or trustee it is made to appear to a police magistrate at the place where the proceedings in any estate are conducted—(A) that it is necessary to meet any urgent claims properly incurred by the assignee or trustee in such estate; and (B) that it would cause undue delay, expense, or hardship to make such application to the Court; and (C) that a sufficient amount is standing to the credit of such estate in the Insolvency Estates Account, such police magistrate may, if he think fit, order such payments out of the said amount standing to the credit of the estate as appears to him to be necessary. Any police magistrate making such order as afore-said must forthwith notify the same to the chief clerk (f).

By police  
magistrate.

Authorisation  
by Court of  
trustee's  
banking  
account.

Form of  
application and  
order.

Penalty for  
improper  
retention of  
moneys.

If it appears to the assignee or trustee or the committee of inspection (if any) that for the purpose of carrying on the insolvent's business or of obtaining advances or because of the probable amount of the cash balance or if the Court be satisfied that for any reason it is for the advantage of the creditors that the assignee or trustee should have an account with a bank the Court may authorise the assignee or trustee to make his payments into and out of such bank as the Court may direct. Such account shall be opened and kept by the assignee or trustee in the name of the insolvent's estate and any interest receivable in respect of the account is part of the assets of the estate (f). The form of application to Court to authorise trustee to have such account is 107, Appendix, *post*, and the form of order therein is 108, Appendix, *post*.

If an assignee or trustee at any time retains for more than ten days a sum exceeding £50 or such other amount as in any particular case the Court authorises him to retain then, unless he explains the retention to the satisfaction of the Court, he must (without prejudice to any other liability, civil or criminal) pay interest on the amount so retained in excess at the rate of



£20 per centum per annum, and in addition he has no claim for remuneration and may be removed from his office, and he is also liable to pay any expense occasioned by reason of his default (g). CHAP. V.

All payments out of money standing to the credit of the "Insolvency Estates Account" must be made in the prescribed manner by cheque drawn and signed by the chief clerk and countersigned by the official accountant (h). Payments out of Insolvency Estates Account.

No assignee or trustee can pay any sums received by him as such assignee or trustee into his private banking account or (except as hereinbefore referred to) into any private banking account, and any contravention of such provision is a misdemeanour (i). Payment of money into private account a misdemeanour.

Whenever the cash balance standing to the credit of the "Insolvency Estates Account" is in excess of the amount which in the opinion of the Court is required for the time being to answer demands in respect of insolvents estates the chief clerk must notify the same to the Treasurer of Victoria, and must by cheque drawn by him and countersigned by the official accountant pay over the same or any part thereof as the Treasurer may require to the Treasurer to such account as he may direct, and the Treasurer may invest the said sums or any part thereof in Government securities to be placed to the credit of the said account. Whenever any part of the money so invested is in the opinion of the Court required to answer any demands in respect of insolvents' estates, the chief clerk must notify to the Treasurer the amount so required, and the Treasurer thereupon repays such sum as may be required to the credit of the "Insolvency Estates Account," and for that purpose may direct the sale of such part of the said securities as may be necessary. The dividends on the investments under this provision are paid to such account as the Treasurer may direct (k). Investment of surplus funds.

Any creditor who has proved his debt, or the insolvent, may apply to the trustee for a copy of the accounts (or any part thereof) relating to the estate as shown by the books directed by the Insolvency Acts to be kept by the trustee, and any other books kept by him, and on paying for the same at the rate of three Creditor may obtain copy of trustee's accounts.

(g) S. 54, Act of 1897.

(h) *Ibid.*

(i) S. 55, Act of 1897.

(k) S. 56, Act of 1897.

CHAP. V. pence per folio, he is entitled to have such copy accordingly (*l*).

Statement of  
accounts may  
be furnished.

And it is lawful for any creditor with the concurrence of one-sixth of the creditors in number or value who has proved (including himself) at any time to call upon the trustee to furnish and transmit to the creditors in prescribed form a statement of the accounts up to the date of such notice, and the trustee must upon the receipt of such notice furnish and transmit such statement of the accounts, provided the person at whose instance the accounts are furnished deposits with the trustee a sum sufficient, or in the event of a dispute a sum which in the opinion of the chief clerk is sufficient, to pay the costs of furnishing and transmitting the accounts, such sum to be repaid to such person out of the estate if the creditors by resolution or the Court so direct (*m*). The form of such statement of accounts is No. 104, Appendix, *post*, with such variations as circumstances may require; the cost of furnishing and transmitting such statement is calculated at the rate of three pence per folio for each statement where the creditors do not exceed ten, and where the creditors exceed ten, one shilling per folio for the preparation of the statement and the actual cost of printing (*n*).

Form of  
statement.

Cost of same.

Trustee's  
statements of  
disposal of  
estate.

The trustee or trustees, and in estates in which there is no trustee, the assignee, must file statements on the first days of the months of January, April, July and October in each year showing how the insolvent estate has been applied and disposed of under the following heads:—

- I. Costs, charges, allowances and expenses.
- II. Remuneration or commission.
- III. Preferential payments to creditors or others directed or authorised to be made by the Acts.
- IV. Dividends to general creditors.

And if any part of the insolvent estate be not at the time of filing any such statement collected, got in, sold or disposed of, such statement must also specify shortly the nature of such unrealised estate (*o*). The trustee must make out and file such further or fuller statements or accounts as the Court or judge may order (*p*).

(*l*) S. 63, Act of 1897.  
(*m*) S. 39, Act of 1897.  
(*n*) R. 363.

(*o*) S. 124, Act of 1890; r. 351.  
(*p*) S. 124, *ante*.

The statements must be in the form No. 38 in the Appendix, *post*, **CHAP. V.**

and must be verified by the affidavit of such trustee or trustees or assignee, and must state upon its face whether it be an interim or final statement of the estate (*q*). In addition to the statement

Form of such statement.

just referred to the trustee or trustees, or in estates in which there is no trustee, the assignee, must, on the first day of the months of January, April, July and October in each year file a statement of all and singular the assets of the estate which have

Trustee's statement of assets of estate.

come to his hands, possession or knowledge as such trustee or assignee or into the hands of any person on his behalf, and stating opposite each item whether the same has or has not been realised, and if realised the amount received for the same, and further showing all moneys received in the estate and the balance in hand which has not been paid away or distributed. Such statement must be in the form No. 39 in the Appendix, and must be verified by the affidavit of such trustee or trustees or assignee, and must state upon its face whether it be an interim or final statement of the receipts and assets of the estate (*r*).

Form of such statement.

Each trustee must also within fourteen days after the 31st December in each year transmit to the official accountant a statement according to the form No. 178 in the Appendix, verified by affidavit of every insolvency or liquidation in which he is a trustee, and the official accountant must preserve such

Annual return by trustee.

returns in his office, which returns may be searched by the public. Any trustee who fails to make such return may be removed from his office by the Court at the instance of any one creditor or of the official accountant, or be subject to such order and to such costs as the Court may think proper to make (*s*).

Form of same.

The chief clerk of the Court in each district upon the expiration of fourteen days from the first days of the months of January, April, July, and October in each year must forward a list to the Honorable the Treasurer of the Colony of Victoria of all estates in which the statements mentioned in rr. 351 and 353 properly verified have not been filed unless final statements have been filed in each of the said estates (*t*).

Chief clerk to report to Treasurer as to statements.

(*q*) R. 352.  
(*r*) R. 353.

(*s*) R. 354.  
(*t*) R. 139.

## CHAPTER VI.

### THE INSOLVENT.

- |  |                                |
|--|--------------------------------|
| 1.— <i>Conduct of Insolvent.</i>       | 5.— <i>Arrest.</i>             |
| 2.— <i>Rights as to Property.</i>      | 6.— <i>Criminal Liability.</i> |
| 3.— <i>Allowances and Maintenance.</i> | 7.— <i>Disabilities.</i>       |
| 4.— <i>Process against the Person.</i> | 8.— <i>Death of Insolvent.</i> |
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#### 1.—CONDUCT OF INSOLVENT.

Certain duties are imposed upon the insolvent in respect to his conduct as follows :—

- (A) He must, until he obtains his certificate, keep his assignee or trustee informed of his true place of residence and business, and any order, summons, notice or other proceeding, unless otherwise provided by the Acts or Rules, posted by prepaid registered letter to or delivered at the address given by him is deemed served on him (a). A breach of this rule is not regarded as a ground for refusal of the certificate (b).
- (B) He must inform the assignee or trustee of any change in his residence and of his mode and means of livelihood (c).
- (C) He must, to the utmost of his power, aid in the realization of his property and the distribution of the proceeds amongst his creditors (d).

Though the insolvent has obtained his certificate of discharge he must, notwithstanding, give such assistance as the trustee or the Court may require in the realisation and distribution of such

(a) R. 109.

(b) *In re Millikin*, 4 V.L.R. (I.), 71.

(c) S. 128, Act of 1890.

(d) *Ibid.*

of his property as is vested in the trustee on payment of reasonable expenses, and if he without reasonable cause fail to do so he is guilty of a contempt of Court (e). CHAP. VI.

- (d) He must produce such a statement of his affairs and give such inventory of his property and such list of his creditors and debtors and of the debts due to and from them respectively, submit to such examination in respect to his property or his creditors; attend such meetings of his creditors; wait at such times on the trustee; execute such powers of attorney, conveyances, deeds and instruments; and generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors as may reasonably be required by the trustee or may be prescribed by rules of Court, or be directed by the Court, by any special order or orders made in reference to any particular insolvency or made on the occasion of any special application by the trustee or any creditor (f). The form of order to insolvent to attend and be examined, or to attend a meeting of creditors under s. 128 quoted is No. 44, Appendix, *post*.

Form of order to attend the examination or meeting.

Where an insolvent has not obtained a certificate of discharge, or where he has obtained a certificate of discharge subject to any

(e) S. 98, Act of 1897.

(f) S. 128, Act of 1890. As to the expression "debts due" in this section such has been held to mean all debts that have been contracted. *Vide Ex parte Kemp, in re Fastnedge*, L.R. 9 Ch., 383, 388. The expression "debts due" occurs frequently in the Act of 1890. In s. 70 it has been held to mean that it is not to be confined to debts presently payable, but on the other hand will not include debts which were only contingent at the commencement of the bankruptcy (*ibid*). Illustrations of these various meanings may be found in the Act. In s. 37, sub-s. 6, it is enacted that it shall be an act of insolvency if a debtor who has been served with a debtor's summons requiring him to pay the *sum due* of not less than £50 has neglected to pay that sum; it is obvious that in this place "due" must mean "payable" because it would be absurd to suppose that a man could be made a bankrupt for not paying a debt which was not yet payable. In *Ex parte Sturt*, L.R., 13 Eq., 309, the chief judge held

that the word "due" must also mean payable in the other parts of that section, because it was not to be supposed that the same word could be used in different senses in the same section, also in the 6th sub-section of the 85th section it is enacted that the trustee may sell the book debts "due" or growing "due"; in that place also "due" seems to mean payable, because debts due are distinguishable from debts growing due. On the other hand, in the 128th section it is enacted that the bankrupt shall give such list of the debts due to or from the creditors respectively as the trustee may reasonably require. In that case it is clear that the word "due" does not mean payable, and that all debts which have been contracted whether the time for payment has arrived or not were intended to be included. It is impossible that acceptances payable *in futuro* or bills of exchange receivable *in futuro* were intended to be excluded from the list of debts due to or by a bankrupt; *vide Mellish, J., ibid*, at p. 388.

**CHAP. VI.** condition as to his future earnings or after-acquired property, or subject to the suspension of such certificate either for a specified time or until such dividend as the Court may fix has been paid to the creditors, it is his duty until he obtains a certificate of discharge, or until such condition is satisfied, or until the period of suspension has expired, or until such dividend is paid (as the case may be), from time to time to give the trustee, the official accountant or the Court such information as the trustee, the official accountant or the Court may require with respect to his earnings and after-acquired property and income or rights to property or income, and not less than once a year to file in the Court a statement showing the particulars of any property or income he may have acquired or become entitled to subsequent to his discharge (*i*).

Duty as to  
after-acquired  
property.

Statement as to  
same.

The statement must be verified by affidavit, and the official accountant or trustee may require the insolvent to attend before the Court to be examined on oath as to such or as to his earnings, income, after-acquired property or dealings (*j*). Where an insolvent neglects to file such affidavit or attend the Court for examination when required so to do, or properly answer all such questions as the Court may put or allow to be put to him, the Court may on the application of the official accountant or trustee rescind the order of discharge (*k*). The form of affidavit is No. 72, Appendix, *post*, with such variations as circumstances may require (*l*).

Form of verify-  
ing affidavit.

Failure to per-  
form certain  
duties a con-  
tempt of Court.

If the insolvent wilfully fail to perform the duties imposed on him by s. 128, Act of 1890, or any of them, or if he fail to deliver up possession to the trustee of any part of his property which is divisible amongst his creditors under the Acts, and which may for the time being be in his possession or under his control, he is, in addition to any other punishment to which he may be subject, guilty of a contempt of Court, and may be punished accordingly (*m*). The provision provides an adequate summary remedy as to any property which an insolvent is known to have and withhold and for imprisonment for contempt, which is at the discretion of the Court (*n*). The section, however, does not apply to money

(*i*) S. 99, Act of 1897 ; r. 312.

(*j*) R. 313.

(*k*) *Ibid.*

(*l*) *Ibid.*

(*m*) S. 128, Act of 1890 ; s. 1, Act of 1897.

(*n*) *In re Rowley*, 3 V.L.R. (L.), 12.

which the insolvent has parted with before the order is made (o). It must, however, be shown that the insolvent had the property still under his control at the time when he is ordered to pay it over (p). The insolvent should deliver up possession of the property when demanded by the trustee, and if he does not he may be committed for contempt without any proceedings being previously taken to obtain the judgment of a Court of competent jurisdiction to the effect that the insolvent held an interest in such property divisible amongst his creditors (q). When the insolvent refuses to deliver up possession it has been indicated that a rule *nisi* might be applied for calling on him to show cause why he should not be committed for contempt (r). In such a proceeding there is jurisdiction to decide whether there is any evidence to support the *bond fides* of a claim set up by a third person to the property, as in the case of the insolvent's wife (s). The mode provided for enforcing orders by the Court of insolvency for contempt is the same as that possessed by the Supreme Court (t). The Supreme Court when the insolvent is committed by the Court of Insolvency for contempt in disobeying an order under this section (u), will on *habeas corpus* examine the proceedings and receive affidavits to ascertain whether there was evidence of the facts on which the warrant purports to have been based (v).

The insolvent must attend the Court on the day appointed for hearing the application for his certificate and on any day or days of adjournment unless the Court otherwise orders, and if he fail to attend without reasonable excuse he is deemed guilty of contempt of court and may be punished accordingly (w).

Attendance on  
certificate  
application.

## 2.—RIGHTS AS TO PROPERTY.

Notwithstanding the sequestration the insolvent is entitled to certain property and rights such as tools of trade and bedding to the statutory amount, rights of action in tort, and wages, all of which subjects pertaining to the insolvent are dealt with under

Rights as to  
property.

(o) *Ibid.* Vide also *Re Gray*, 2 V.L.R. (L.), 241.

(p) *Re Gray*, ante.

(q) *In re Vincent*, 1 A.L.R., 167.

(r) *Per Noel, J.*, *In re Mundhang*, 1 A.L.T., 56, referring to *In re Rowley*, 3 V.L.R. (L.), 12, but in that case the procedure adopted was by motion.

(s) *In re Mundhang*, ante.

(t) *In re Slack*, 2 V.R. (L.), 64. Vide also s. 17, Act of 1890, and Chapter I., at p. 26.

(u) S. 128, Act of 1890.

(v) *In re Gray*, ante.

(w) R. 304.

CHAP. VI. the heading "Property not divisible amongst creditors," Chapter V., Division 2, *ante*.

Right of insolvent to surplus.

Surplus in case of a deceased person's estate.

Nature of insolvent's interest in surplus.

The insolvent is entitled to any surplus remaining after payment in full of his creditors and the costs, charges and expenses of the proceedings in the insolvency (*x*) and if any surplus remains in the hands of a trustee in insolvency after payment in full of all debts due by the estate of a deceased person together with the costs of the administration and interest as provided by the Insolvency Acts such surplus must be paid over to the representatives of the estate or dealt with in such manner as may be prescribed or as the Court may direct (*y*).

It has been held that the bankrupt while undischarged had no interest in the surplus beyond a mere hope or expectation and he could not by assigning the surplus by way of security give to such assignee any right to interfere in the administration of the estate (*z*). Even when he has obtained his discharge and has become entitled to the surplus, all the creditors having been paid in full, he is not entitled to obtain the taxation of a bill of costs paid by his trustee, as the trustee is not a trustee for the bankrupt (*a*), nor is he trustee of the surplus of the estate for the bankrupt (*b*). It has been held that a certificated insolvent is entitled to an account against his trustee if he can show a probability of a surplus (*c*). The surplus is not an attachable debt in the hands of the trustee (*d*). Under the Act 5 Vict. No. 17, which made no provision for the means of effecting the final winding up of an estate, in an instance where the assets realised in an insolvent's estate exceeded the scheduled liabilities and all the creditors who had proved upon the estate had been paid in full, but some of the scheduled creditors had not proved, the Court, after a lapse of four years from the date of the sequestration, and after public advertisements of the facts, ordered the entire balance of assets in the hands of the official assignee to be paid over to the insolvent upon his indemnifying the official assignee and undertaking to satisfy the demands of the creditors who had

(*x*) S. 49, Act of 1897—compare *Bankruptcy Act 1883*, s. 65.

(*y*) S. 113, Act of 1897.

(*z*) *Ex parte Sheffield*, in *re Austin*, 10 Ch. D., 434.

(*a*) *In re Leadbitter*, 10 Ch. D., 388.

(*b*) *Ex parte Sheffield*, in *re Austin*,

*ante*.

(*c*) *Ex parte and in re Malachy*, 1 M. D. & D., 353; *vide* also observations in *Vail v. Gilmour*, 11 V.L.R., at p. 384.

(*d*) *Vide Hunter v. Greenshull*, L.R. 8 C.P., 24.



not proved if they should thereafter do so (e), and it was held, however, that it would be more conformable to that Act to direct the assignee to file a plan of distribution disposing of the surplus and to hand it over to the insolvent if the plan was not objected to (f). CHAP. VI.

An estate having yielded a surplus and the insolvent subsequently becoming again insolvent, an order was made on consent of all parties concerned, a satisfactory indemnity being given to the assignee under the first insolvency for payment of such surplus to the assignee under the second insolvency (g). Disposition of surplus in second insolvency.

When the estate is ordered by the Court to be released from sequestration the effect of the order is to revest in the insolvent all the property of the insolvent undisposed of which by virtue of the Act was vested in the trustee in the same manner as if the estate of such insolvent had never been sequestered (h). The policy of a release is partly to reinstate insolvents in their honest industries (i). The subjects of release of the estate and certificate of discharge are dealt with in Chapter VIII., "Discharge of Insolvent," and where an insolvent's estate is ordered to be released from sequestration the assignee or trustee, as the case may be, must account to the insolvent (j). Revesting of estate in insolvent by release.

No claim can be made after the expiration of twenty years from the date of sequestration of the estate by the assignee or trustee of any insolvent estate to any estate or interest in any land belonging to any insolvent (k). Limitation of claim by trustee in insolvent estate.

### 3.—ALLOWANCES AND MAINTENANCE.

The trustee may from time to time make such allowance as may be approved of by the Court, the committee of inspection or resolution passed by a general meeting of creditors, to the insolvent out of his property for the support of the insolvent and his family or in consideration of his services if he is engaged in winding up his estate (l), and the creditors may by resolution at a general meeting direct that the whole or such part as they may

(e) *In re Milner*, 1 W. & W. (L.), 177.

(f) *In re Dickson*, 2 W. & W. (L.), 63; and vide also *Ex parte Flower, re Rutledge*, 3 W.W. & a.B. (L.), 36.

(g) *Goodman v. Boulton*, 3 V.R. (E.), 20.

(h) S. 133, Act of 1890.

(i) *In re Scallan*, 2 V.L.R. (L.), at p. 8.

(j) R. 369.

(k) S. 50, Act of 1897.

(l) S. 120, Act of 1890.

**CHAP. VI.** circumstances it would be that the debtor should be imprisoned unless he paid the money, but as on insolvency all his assets go to his assignee the debtor could not pay (*d*). Insolvency also will not entitle a person to his discharge who has been committed to prison under s. 51 of the *Marriage Act* 1890 till he pays arrears of maintenance to his wife, as the non-compliance with the order is considered as an offence and not as a debt, and is not within the terms of an arrest under *mesne* process or in execution of a judgment decree or order (*e*).

As to *Marriage Act* 1890.

### 5.—ARREST OF INSOLVENT.

Arrest of insolvent by warrant of Court.

The Court may by warrant (*f*) addressed to any constable or prescribed officer of the Court cause an insolvent to be arrested, and any books, papers, moneys, goods and chattels in his possession to be seized and him and them to be safely kept as prescribed until such time as the Court may order under the following circumstances :—

When insolvent about to go abroad with a view, &c., or quit his place of residence.

(1) If after sequestration or the commencement of the liquidation it appear to the Court that there is probable reason for believing that the insolvent is about to go abroad or to quit his place of residence with a view of avoiding examination in respect of his affairs or otherwise delaying or embarrassing the proceedings in insolvency (*g*). The mere pendency of the insolvency is not a sufficient ground for the issue of a warrant; it must be shown that there is some examination or other specific proceeding which the insolvent intended to defeat by going abroad (*h*).

About to remove his goods with a view, &c.

(2) If after sequestration or the commencement of the liquidation it appear to the Court that there is probable cause for believing that the insolvent is about to remove his goods or chattels with a view of preventing or delaying such goods or chattels being taken possession of by the trustee, or that there is probable ground for believing that he has concealed or is about to conceal or destroy any of his goods or chattels or any books,

Concealment or destruction of goods, books, &c.

(*d*) *D'Arcy v. Herrick*, 17 A.L.T., 111, referring to *Hitchins v. Trimble*, 2 A.L.T., 147. In this case no order was made.

(*e*) *Re Harris*, 6 V.L.R. (L.), 47.

(*f*) Form No. 136, Appendix, *post*.  
(*g*) S. 129, Act of 1890. Compare *Bankruptcy Act* 1869, s. 86, and *Bankruptcy Act* 1883, s. 25.

(*h*) *Re Knarston*, 4 A.J.R., 160.

documents or writings which might be of use to his creditors in the course of his insolvency (*i*). CHAP. VI.

(3) If after the service of a debtor summons or after sequestration or the commencement of the liquidation the debtor or insolvent remove any goods or chattels in his possession above the value of five pounds without the leave of the trustee, or if, without good cause shown, he fails to attend any examination ordered by the Court (*k*). Removal of goods.  
Failure to attend examination.

Where a debtor is arrested under a warrant issued under s. 129, Act of 1890, he must be given into the custody of the governor or keeper of the prison mentioned in the warrant, who must produce such debtor before the Court as it may from time to time direct, and must safely keep him until such time as the Court otherwise orders, and any books, papers, moneys, goods and chattels in the possession of the debtor which may be seized must forthwith be lodged with the assignee or trustee, as the case may be (*l*). In addition to the above provisions the Court can punish for contempt (*m*). Custody and production of debtor.

It was queried in *In re Knarston*, 4 A.J.R., 160, if the Court of Insolvency had jurisdiction to take a bail bond under s. 129, Act of 1890. The only express power of granting bail given to the Court by the Acts is under s. 8, Act of 1897, and that under s. 148, Act of 1890, as to insolvent's attendance for judgment on an opposed certificate application and renewal of same under r. 450. Bail.

## 6.—CRIMINAL LIABILITY.

The insolvent is criminally liable for the offences set out in respect to him in Chapter XI. hereof, *post*, and which are fully dealt with therein, and also for the offences set out in Chapter VIII. in respect of which the certificate in addition may be refused or suspended.

## 7.—DISABILITIES.

Insolvency is a disability imposed by law (*n*) and operates as a disability in many cases of persons holding public and other

(i) S. 129, *ante*.

(k) *Ibid*.

(l) R. 98.

(m) *Vide* Chapter I., *ante*, at p. 27.

(n) *Vide In re Carew, Carew v. Carew*, (1896) 1 Ch., at p. 534.

## CHAP. VI.

General  
provision.

positions and the Acts provide generally that where under the provisions of any Act now or hereafter in force the members of any board or of the council of any city, town, borough or shire or of any other public body are rendered incapable by reason of insolvency, the same incapacity extends to every arrangement or composition by every such member with his creditors under the Acts (o).

Members of  
Parliament.

No person who is an uncertificated bankrupt or insolvent can be elected or continue to be a member of the Legislative Council (p) neither can such a person be elected a member of the Legislative Assembly, and if any such person is elected and returned as a member of the Assembly, such election and return is void, and if any person so elected sits or votes as a member of the Assembly he is liable to a penalty of £200 for every day he sits or votes (q).

Justices of the  
Peace.

A justice of the peace being insolvent or applying to take the benefit of any Act for the time being in force for the relief of insolvent debtors or by any deed or other writing compounding with or making any assignment for the benefit of his creditors becomes incapable of acting as a justice until he has been newly assigned or appointed (r). This disqualification is also applicable to the president for the time being of any shire, every mayor for the time being of every city, town or borough, and every mayor and mayor elect for the time being of Melbourne and of Geelong and to any member of the Executive Council, every judge of the Supreme Court, every chairman of the General Sessions, every coroner, deputy coroner, and every police magistrate who are by virtue of their offices justices of the peace (s). Though, however, a justice be incapable of acting as such if he is under the disability pointed out still his acts it has been held are not void, as the persons affected by them are not responsible (t).

Officers in the  
Public service,  
Railway service  
or officers of  
Parliament.

In the event of the sequestration of the estate of any officer in the public service or the railway service or any officer of Parliament either voluntarily or compulsorily "for the benefit of his creditors," such officer must apply as soon as he can legally do so for a certificate of discharge, and if on such application it

(o) S. 162, Act of 1890.

(p) *The Constitution Act Amendment Act 1890*, s. 35 (3).(q) *Ibid.*, s. 125.(r) *Justices Act 1890*, s. 16.(s) *Ibid.*(t) *Carbarns v. Bell*, 14 A.L.T., 274; vide also *Margate Pier Company v. Hannan*, 3 B. & A., 266.

appears to the Court of Insolvency that the applicant has been guilty of fraud, dishonorable conduct or extravagance it is the duty of the Court to direct its chief clerk thereupon to report the same to the Minister or head of the department in which such officer is employed. If such officer do not apply in the manner stated for his certificate and if he apply and it appears from the report that such officer has been guilty of fraud, dishonorable conduct or extravagance he may be dismissed or reduced to a lower rank or fined, reprimanded or otherwise punished upon the recommendation of the Public Service Board, the Chief Secretary or the Victorian Railways Commissioner, as the case may be, by order of the Governor-in-Council (*u*).

The like provisions have been enacted in respect to members of the police force, the report of the Court in this case must be sent to the Minister or to the Chief Commissioner of Police, and the punishment is imposed upon the recommendation of the Chief Commissioner, by order of the Governor-in-Council (*v*).

An uncertificated insolvent is incapable of being appointed a commissioner to the Victorian Railways, and any commissioner who becomes insolvent or applies to take the benefit of any Act in force for the relief of insolvent debtors or compounds with his creditors or assigns his salary for their benefit, forfeits his office (*w*).

Insolvency is a bar to membership of various public bodies, as the Melbourne Harbor Trust (*x*), the Marine Board (*y*), Waterworks Trusts (*z*), Melbourne and Metropolitan Board of Works (*a*), the Council of the City of Melbourne and its auditors and assessors (*b*). No uncertificated or undischarged bankrupt or insolvent is capable of being or continuing a councillor of any municipality (*c*), and the penalty prescribed is fifty pounds for every offence (*d*). A man who has been twice insolvent and has obtained a certificate in his latter insolvency but not in his former insolvency is an uncertificated insolvent within the meaning of s. 50

(*u*) *Public Service Act* 1893, s. 30.

(*v*) *Police Regulations Act* 1896, s. 7.

(*w*) *Railways Act* 1890, s. 47.

(*x*) *Melbourne Harbor Trust Act* 1890, s. 16.

(*y*) *Marine Act* 1890, s. 48.

(*z*) *Water Act* 1890, s. 203.

(*a*) *Melbourne and Metropolitan Board*

*of Works Act* 1890, s. 15.

(*b*) 6 Vict. No. 7, s. 57, the provisions of which were extended to Geelong by 13 Vict. No. 40, s. 5.

(*c*) *Local Government Act* 1890, s. 50.

(*d*) *Ibid*, s. 53.

**CHAP. VI.** of the *Local Government Act* 1890, and when a man who is an uncertificated insolvent at the time of his election subsequently obtains his certificate his election is invalid notwithstanding (e).

**Jurors.** An uncertificated bankrupt or insolvent cannot serve as a juror (f).

**Attorneys under registered power.**

Insolvency of the principal determines a power of attorney, but every act within the scope of the powers and authority conferred upon the attorney done, performed or submitted after the insolvency and before registration thereof in favour of any person who has *bond fide*, and without notice of the insolvency, dealt with such attorney in the name of the principal, is as effectual in all respects as if the insolvency had not happened (g). Registration of the insolvency is effected by filing in the office of the Registrar-General a declaration by any person that the principal is insolvent and the same is annexed to the power it refers to (h).

**Trustee in insolvency.**

If the estate of a trustee of an insolvent estate be sequestrated or if he make a composition with his creditors or liquidate his affairs by arrangement he thereby vacates his office as trustee (i), and if a member of the committee of inspection become an insolvent his office thereupon becomes vacant (k).

**Committee of inspection.**

**Ordinary trustees.  
Power of Supreme Court to order conveyance, &c., of property.**

If an insolvent at the date of the order of sequestration as trustee is seised, possessed of, or entitled to either alone or jointly any real or personal estate or any interest secured upon or arising out of the same or has standing in his name as trustee either alone or jointly any government stocks, funds, or securities or any stock of any public or joint stock company, the Supreme Court may on the petition of the person entitled in possession to the receipt of the rents, issues and profits, dividends, interest or produce thereof on due notice given to all other persons (if any) interested therein order the trustee and all persons whose act or consent thereto is necessary to convey, assign, or transfer the said real or personal estate, stocks, funds, or securities of the said stock of any public or joint stock company to such person as it thinks fit upon the same trusts as the said estate, interest, stocks, funds, and securities were subject to before sequestration or such

(e) *Reg. v. Knipe*, 3 W.W. & a'B. (L.), 46.

(f) *Juries Act* 1890, s. 7.

(g) *Instruments Act* 1890, s. 196.

(h) *Ibid*, s. 200.

(i) S. 64 (4), Act of 1890 ; s. 29, Act of 1897.

(k) S. 64 (12), Act of 1890.

of them as are then subsisting and capable of taking effect and also to receive and pay over the rents, issues and profits, dividends, interest, and produce thereof as it directs (*l*). In the case where a trustee of real estate who had become possessed of personal estate and held it subject to the trust, carried on business with it for the benefit of the *cestuis que trustent*, and subsequently sequestrated his estate, upon petition by them for his removal under the provision quoted to which the insolvent consented but asked for the taking of accounts and an indemnity, it was held that in view of the complicated transactions the Court had no jurisdiction under the section to make the summary order but that the proper course was by suit (*m*).

The petition should be served on all parties interested, including children entitled in remainder (*n*), but it is unnecessary to have a guardian *ad litem* appointed of infants who are not respondents to the petition but have been served with notice of it (*o*). It is necessary that all persons entitled in possession to the settled property should concur in the petition as the jurisdiction given is a summary one, and should be exercised strictly (*p*). Under a similar provision in the Act 32 and 33 Vict. c. 71, s. 117, it was held that the Court would as a general rule order the trustees removal on his bankruptcy whether he holds the position either solely or jointly with others if it is not shown that he has since become possessed of means (*q*).

#### 8.—DEATH OF INSOLVENT.

If the insolvent die after sequestration under Part III. of the Act of 1890 or adjudication of sequestration under Part IV., the sequestration after notice has been given to such persons if any as the Court may think fit, is proceeded in as if such insolvent were living (*r*). By s. 108 (1) Act of 1897, it is further provided that if a debtor by or against whom an insolvency petition has been

(*l*) S. 92, Act of 1890.

(*m*) *In re Clarke's Trusts*, 5 V.L.R. (E.), 28.

(*n*) *In re Patrick Healey*, 6 V.L.R. (E.), 240.

(*o*) *In re Martin Healey*, 7 V.L.R. (E.), 1.

(*p*) *Ibid*.

(*q*) *In re Adams' Trust*, 12 C.D., p. 634. It was also stated in *In re Martin Healey*, *ante*, that no doubt it would be the duty of the Court to remove a bankrupt trustee as being unfit.

(*r*) S. 131, Act of 1890—compare 32 and 33 Vict. c. 71, s. 80 (9).

CHAP. VI. presented die the proceedings in the matter unless the Court otherwise orders shall be continued as if he were alive (s).

Where the debtor died two days after presenting his petition it was held that the proper course for the Court to pursue in the absence of any arrangement on the part of the representatives of the deceased debtor was to make the order and allow the matter to proceed in the ordinary way (t). In the case of a compulsory sequestration, where the debtor dies after the petition has been presented, but before service of the necessary documents on him, all further proceedings are stayed (u).

(s) Compare *Bankruptcy Act* 1883, s. 108.

(t) *In re Walker*, 3 Morrell, 69.

(u) *Vide in re Easy, ex parte Hill*, 4 Morrell, 281; 19 Q.B.D., 538.



## CHAPTER VII.

### EXAMINATIONS.

- |   |  |
|---|--|
| <p>1.—<i>Practice under s. 134, Act of 1890.</i><br/>2.—<i>Practice under s. 135, Act of 1890.</i><br/>3.—<i>Reduction of Evidence to Writing and Shorthand-writers.</i><br/>4.—<i>Nature of the Examinations.</i><br/>5.—<i>Power to order Insolvent to File Accounts.</i><br/>6.—<i>Committal of Insolvent &amp; Witnesses.</i></p> | <p>7.—<i>Practice in Examinations before Police Magistrate.</i><br/>8.—<i>Examination in cases of Liquidation by Arrangement.</i><br/>9.—<i>Examination in cases of Composition.</i><br/>10.—<i>Examinations under Deeds of Arrangement.</i></p> |
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- 11.—*Examinations under Companies Act 1890.*

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#### 1.—PRACTICE UNDER S. 134, ACT OF 1890.

UPON the application in writing of the trustee the judge may, Examination sitting. within three months after sequestration under Part 3, Act of 1890, or adjudication of sequestration, cause an examination sitting of the Court to be holden, at which the insolvent must attend, having no lawful impediment at such time made known to and allowed by the Court (a), and further the trustee may, at any time before the granting to the insolvent of an absolute certificate of discharge, and must, on the request in writing of one-fourth of the creditors in number and value who have proved, or when thereunto directed by the Court apply to the Court to appoint a day and hour for holding an examination sitting of the Court, under s. 134, Act of 1890, and upon such application being made the Court must by an order appoint the day and hour of such examination and order the debtor to attend the Court upon such day and at such hour (b).

The form of application is No. 45, Appendix, *post*, and the form Form of application and order. of the order of the Court is No. 46, Appendix, *post*.

(a) S. 134, Act of 1890.

(b) R. 191.

## CHAP. VII.

Direction to  
trustee.

If the Court, either upon application or without any application, directs the trustee, or if one-fourth of the creditors in number or value who have proved shall in writing at any time before the granting of an absolute certificate of discharge, request the trustee to cause an examination sitting of the Court to be held, the trustee must comply with such direction or request (c).

Notice of  
examination to  
creditors and  
insolvent and by  
advertisement.

At least seven days' notice of the intention to hold the examination must be advertised in a local newspaper by the trustee and a similar notice sent to the creditors (d). R. 193 also provides that the trustee must, seven days before the day appointed for the examination, serve a copy of the order on the insolvent and advertise in a local paper and send to the creditors notice of such order and of the time and place appointed thereby; and s. 134, Act of 1890, enacts that the trustee must give notice of the time and place at which the sitting is to be held by advertisement in the *Government Gazette* and some newspaper published in the district and to the insolvent in the prescribed manner.

Form of notice.

The form of notice is No. 47, Appendix, *post*.

Examination  
without notice.

S. 111 (3), Act of 1897, provides that the trustee and any creditor who has proved his claim may, without any notice to the insolvent, examine the insolvent.

Adjournment.

The Court may adjourn the sitting from time to time as it may think fit (e).

Signing of  
depositions.

The notes taken of a debtor's examination must be read over to or by the debtor and be then signed by him at the foot of each page (f), and on his refusal to sign, not having any lawful objection allowed by the Court, he may be committed to prison until he submits (g).

Forms of notes.

The forms of notes are Nos. 52 and 53, Appendix, *post*.

Conduct money.

As to conduct money, *vide* p. 61, *ante*.

Failure of  
debtor to attend  
examination.

If the debtor fail to attend the examination at the time and place appointed by any order for holding or proceeding with the

(c) S. 111 (1), Act of 1897, this provision also applies to s. 135, Act of 1890.

(d) *Ibid* (2).

(e) S. 134, *ante*.

(f) R. 195.

(g) S. 135, Act of 1890.

same, and no good cause is shown by him for such failure, it is lawful for the Court upon its being proved to its satisfaction that the order requiring the debtor to attend the examination was duly served and without any further notice to commit him to prison as provided by s. 135, Act of 1890, or to make such other order as the Court may think fit (*h*). S. 129, Act of 1890, also provides that in the event of the insolvent not attending any examination ordered by the Court without good cause shown the Court may by warrant cause him to be arrested, and the same power arises if it is shown that the insolvent is about to go abroad or to quit his place of residence with a view of avoiding examination (*i*). The general form of warrant to be used is that in form 136, Appendix, *post*. CHAP. VII.  
Form of warrant.

As to examination on commission and at any place, *vide ante*, at p. 33. A form of order is given in No. 54, Appendix, *post*, in the case of mental or physical affliction or disability. Examination by  
commission and  
at any place.

## 2.—PRACTICE UNDER S. 135, ACT OF 1890.

On the application of the trustee, the Court may at any time after sequestration, summon before it the insolvent or his wife or any other person known or suspected to have in his possession any of the estate or effects belonging to the insolvent, or supposed to be indebted to the insolvent or any person whom the Court may deem capable of giving information respecting the insolvent his trade dealings or property; and the Court may require any such person to produce any documents in his custody or power relating to the insolvent, his dealings or property, and may examine on oath by word of mouth, or by written interrogatories, any such person concerning the insolvent, his dealings or property (*k*). The summons may be issued whether a witness is out of the jurisdiction or not (*l*), and if s. 15 of the Act of 1897 applies, the summons may be made returnable at such place to be named therein as a judge may determine in whatever district such place may be (*m*). Examination of  
insolvent and  
other persons.

S. 111 (3), Act of 1897 provides that the trustee and any Examination  
without notice.

(*h*) R. 192.

(*i*) S. 129, Act of 1890.

(*k*) S. 135, Act of 1890.

(*l*) *In re Thoneman*, 13 V.L.R., 204.

(*m*) *Vide* p. 39.

**CHAP. VII.** creditor who has proved his claim may, without any notice to the insolvent, examine the insolvent.

Power of Court to order delivery of property or payment of debt admittedly belonging or due to insolvent.

As to power of the Court to order the delivery of property admitted in an examination by a witness as belonging to the insolvent, and the payment of a debt likewise admitted as due to the insolvent, *vide ante* "Jurisdiction," at pp. 12 and 13. The Court has no jurisdiction to make an order for the delivery of goods in the possession of a person as agent for another (*n*).

Form of request.

Every application to the Court under s. 135, Act of 1890, must be in writing, print or type-written, and it must state shortly the grounds upon which the application is made (*o*).

The form of request is No. 48, Appendix, *post*.

Direction for examination.

If the Court, either upon application or without any application, directs the trustee, or if one-fourth of the creditors in number or value who have proved, in writing at any time before the granting of an absolute certificate of discharge request the trustee to summon before it any person liable to be summoned under s. 135, Act of 1890, the trustee must comply with such direction or request (*p*).

Notice of examination.

At least seven days' notice of the intention to hold the examination must be advertised in a local newspaper by the trustee and such notice must be sent to the creditors (*q*).

Forms of summons.

The form of summons is No. 49, *post*.

Witnesses' expenses, conduct money and costs.

As to witnesses, expenses, conduct money and costs, *vide ante*, at p. 61.

Production of documents.

The Court has no jurisdiction to commit a witness for contempt in refusing to produce documents who has been subpoenaed under s. 30, Act of 1890, but not summoned under s. 125, Act of 1890, as a subpoena cannot be issued by the Court in non-contentious matters, but only in motions, petitions or summonses (*r*).

Signing of Depositions.

S. 135 contemplates the signing of the depositions by witnesses and confers power on the Court to commit in case of refusal, and r. 195 also provides that the notes taken of a debtor's examina-

(*n*) *In re Davis, ex parte Goodman*,  
5 *Manson*, 329.  
(*o*) R. 93.  
(*p*) S. 111 (1), Act of 1897; r. 194.

(*q*) S. 111 (2), Act of 1897.  
(*r*) *In re Ellison*, 19 *V.L.R.*, 548;  
*sed vide* r. 73.

tion must be read over to or by the debtor and be then signed by him at the foot of each page (s). The forms of notes are Nos. 52 and 53, Appendix, *post*. In the case of refusal without lawful objection allowed by the Court, the Court may commit the witness to prison to remain there without bail, until such witness submits to sign (t). CHAP. VII.  
Forms of notes.

If any person refuses to come before the Court at the time appointed or to produce documents after being tendered a reasonable sum and having no lawful impediment made known to the Court at the time of its sitting and allowed by it the Court may by warrant cause such person to be apprehended and brought up for examination (u). The form of warrant is No. 140, Appendix, *post*. The warrant may issue though the insolvent is out of the jurisdiction of the Court (v), and though the summons was not personally served but was served by substituted service under the provisions of r. 101, Act of 1890, the Court, it was held, could issue a warrant for the arrest of the witness under s. 135 (w). Apprehension  
by warrant.  
  
Warrant where  
witness out of  
jurisdiction.

The examination of any witness may be adjourned from time to time as often as it may seem fit to the Court, and the Court has and may exercise at any adjournment of any such summons all the powers given on an examination (x). Adjournment of  
examination.

As to examination on commission, and at any place, *vide ante*, at p. 33. A form is given, No. 54, Appendix, *post*, in the case of mental and physical affliction or disability. Examination on  
commission and  
at any place.

### 3.—REDUCTION OF EVIDENCE TO WRITING AND SHORTHAND WRITERS.

On any examination under Part VII. of the Act of 1890, the Court may permit or direct the chief clerk or such other person as the Court may approve to reduce the evidence of the insolvent or person examined to writing (y); and if the Court in any case and at any stage in the proceedings is of opinion that it

(s) R. 195.  
(t) S. 135, Act of 1890.  
(u) S. 135. *Vide also In re Batson*,  
*ex parte Hastie*, 1 Manson, 45.  
(v) *In re Thoneman*, 13 V.L.R.,  
204.

(w) *In re Glew*, 17 A.L.T., 56; 1  
A.L.R., 48. *Vide also In re Franklyn*,  
"Argus," 10th April, 1886.  
(x) S. 135, *ante*.  
(y) S. 136, Act of 1890.

**CHAP. VII.** would be desirable that a person other than the person before whom the examination is taken should be appointed to take down the evidence of the debtor, or of any witness or witnesses examined in any matter or in any proceeding heard by or taken before it in shorthand or otherwise, it is competent for the Court to make such appointment, and every person so appointed is entitled to be paid the fees prescribed by the Governor-in-Council under s. 12 of the *Evidence Act* 1890 (No. 2), to be payable to a shorthand writer, licensed under the provisions of the said Act, and such fees must be paid in the first instance by the party at whose instance any appointment was made, or out of the estate as may be directed by the Court, provided that upon the making of any order such fees may be directed to be paid by any party to the proceedings (z). Where the assignee or trustee as the case may be applies for the appointment of a person to take down in shorthand the evidence of a debtor at an examination sitting held under s. 134, Act of 1890, or of the debtor or his wife or any other person examined under s. 135 of the said Act, he must nominate a person for the purpose, and the person so nominated is appointed unless the Court or judge otherwise orders (a).

Forms of  
appointment of  
shorthand-  
writers,  
declaration, and  
notes of  
examination.

The form of appointment of shorthand-writer is No. 50, Appendix, *post*. The form of declaration of shorthand-writer is No. 51, Appendix, *post*. The form of notes of debtor or witness where a shorthand-writer is appointed is No. 52, Appendix, *post*, and where he is not appointed the form is No. 53, Appendix, *post*.

Duty of chief  
clerk as to  
evidence.

It is the duty of the chief clerk to peruse all evidence taken upon examinations under Part VII., Act of 1890, and to report to the Attorney-General at least once in every month whether such evidence in any case shows or tends to show that an offence against the insolvency law has been committed by any person (b).

Inspection of  
depositions and  
copies of same.

The depositions are "proceedings" (c) and may be inspected by any person on payment of the prescribed fee (d), but the Court has a discretion whether to give a copy of the shorthand notes of the deposition of a witness to him or not (e).

(z) R. 79.

(a) R. 80.

(b) S. 114, Act of 1897.

(c) *In re and ex parte Beall*, (1894)

2 Q.B., 135.

(d) *Ibid*, and s. 126, Act of 1897.

(e) *Ex parte Pratt, re Hayman*, 21 C.D., 439.

## 4.—NATURE OF THE EXAMINATIONS.

## CHAP. VII.

The insolvent must under s. 134, Act of 1890, submit to be examined on oath by the trustee or any creditor as to (1) his trade dealings and estate; (2) upon any matter which may tend to disclose any secret alienation, transfer, surrender, delivery, or concealment of his estate or effects. He must also under s. 128 submit to such examination in respect of his property or his creditors as may be reasonably required by the trustee, or as therein set out. The trustee (g) and any creditor who has proved his claim may, without any notice to the insolvent, examine him (h). The trustee in any examination by him has the sole power to choose counsel (i). The examination is almost always adverse to the insolvent, and what is wanted by it is a discovery of the dealings of the debtor for the advantage of the creditors and to enable the trustee to perform properly his duties on their behalf, and it is not to be limited by the rules of evidence acted upon elsewhere, but any evidence which in the words of the section informs the Court respecting the trade dealings or estate must be given unless substantial injustice is thereby inflicted on the witnesses who are required to give it (k). As to insolvent.

The insolvent cannot avail himself of the privilege to which other witnesses are entitled of claiming protection from answering questions on the ground that he might expose himself to criminal proceedings, as it is his duty as a personal obligation to discover the whole of his estate and effects to his creditors (l), and no question put to him is deemed unlawful by reason only that the answer thereto may expose him to punishment under the Act (m). The objects of an examination include the fullest disclosure of the insolvent's dealings, and the corrupt influencing of the witness to disregard his duty as a witness and as an insolvent and to endeavour to conceal what it is his primary duty to disclose is a contempt of Court and punishable as such (n).

(g) As to the application for an examination by the trustee and practice thereon, *vide ante*, at pp. 355, 357.

(h) S. 111, Act of 1897.

(i) *In re Mackay*, 3 A.J.R., 10.

(k) *In re M'Kay and Bell*, 3 A.J.R., 98.

(l) *Vide Ex parte Schofield*, in *re Firth*, 6 Ch. D., 230, *per James, L.J.*, 233; *Reg. v. M'Cooley*, 5 V.L.R. (L),

38.

(m) S. 137, Act of 1890.

(n) *In re Hooley, Rucker's case*, 5 Manson, at p. 334. It appears to have been queried in this case whether it would be a contempt if the offer of money were only made to induce the insolvent to abstain from, knowingly making false charges.

CHAP. VII.

Under s. 135, Act of 1890, the insolvent, his wife or any other person known or suspected to have in his possession any of the estate or effects belonging to the insolvent, or supposed to be indebted to the insolvent, or any person whom the Court may deem capable of giving information respecting the insolvent, his trade dealings or property, may be examined.

The examination may be either *viva voce* or by written interrogatories (*o*), and it should be "full, fair and searching, and not "rambling or irrelevant" respecting the insolvent, his dealings or property (*p*). The proceeding is inquisitorial, and the Court may get anybody before it whom it thinks capable of giving information, and may elicit from him without regard to the ordinary rules of evidence facts which may afterwards be used against him or any other person in connection with insolvent's estate (*q*), and an examination is also regarded as a means of collecting evidence for the purpose of having it placed before the Court when it has to consider the discharge of the insolvent (*r*). It is in one sense a judicial proceeding, because it is a step in a judicial proceeding, but it is not a judicial inquiry for the purpose of arriving at a decision (*s*). The witness must answer any lawful question touching the matters indicated (*t*).

Privilege.

A witness other than the insolvent is privileged to claim protection from answering questions as to the dealings or estate of the insolvent on the ground that the answers would tend to criminate him (*u*), but the Court must be satisfied from the circumstances of the case and the nature of the evidence which the witness is called upon to give that there is reasonable ground to apprehend danger to him from his being compelled to answer, and when it is once made to appear that the witness is in danger great latitude should be allowed him in judging for himself of the effect of any particular question (*v*). The judge is bound to insist upon the witness answering unless he is satisfied that the answer will tend to place him in peril (*w*).

(*o*) S. 135, Act of 1890.

(*p*) *Vide Ex parte Legge*, 22 L.J., Q.B., 345; s. 135, ante.

(*q*) *In re Sinclair, ex parte Watson*, 15 V.L.R., at 741. *Vide also Re Goldsmith*, 5 V.L.R. (I.), at p. 21.

(*r*) *In re and ex parte Beall*, 1 Manson, at p. 204.

(*s*) *Ibid.*

(*t*) S. 135, ante.

(*u*) *Ex parte Schofield, in re Firth*, 6 C.D., 230.

(*v*) *Ex parte and in re Reynolds*, 20 Ch. D., 294; *Vide the Evidence Act 1890*, s. 56; *Smith v. Powell*, 10 V.L.R. (L.), 79; *Roper v. Williams*, 6 A.L.T., 65; and *Lamb v. Munster*, 10 Q.B.D., 110.

(*w*) *In re Reynolds, ante.*



If a witness objects to answer questions put to him he cannot be made a respondent to an appeal against a decision refusing to order the witness to answer such questions (x). CHAP. VII.  
Where witness  
objects to  
answer.

Although the answers of a witness must in the end be accepted in so far that witnesses cannot be called to contradict him, yet the Court is not bound at once to accept the first answer as conclusive, but the witness may be cross-examined to see whether he will stand by his answer (y). Witness may be  
cross-examined.

It is no answer to excuse being examined for the witness to say that an action is pending by the trustee against him, but the questions must be put *bonâ fide* for the benefit of creditors and not for any indirect purpose (z). It would of course be otherwise if the person in whose interest the examination is being held had an action pending against the witness and sought to elicit information by an examination for his personal benefit (a), and the trustee should therefore not allow himself to be made use of by a creditor for the purpose of obtaining under cover of the examination evidence which might be available against the witness in an action by such creditor (b). Though where there is an action pending against the witness by the trustee the latter is entitled to reasonable information, the Court will not as a general rule allow its powers for the examination of a witness to be treated as a mere step in an action between the trustee and the witness, and the fact that such an action is pending does not of itself justify the trustee in at once resorting to an examination (c). Examination  
when action  
pending against  
witnesses.

If the insolvent gives evidence against himself he can explain his evidence at the termination of his examination or he may ask for the opportunity of explaining it in a further examination (d), and the practice of the Court has been to permit any witness examined to make explanations and allow his counsel to ask such questions as will throw further light on the matter, correct mistakes, or remove any misapprehension that may have occurred. In the event of the insolvent wishing to explain his former state- Explanation of  
evidence.

(z) *In re Scharrer, ex parte Tilly*, 5 Morrell, 79.

(y) *In re Scharrer, ex parte Tilly*, 5 Morrell, 79 and 81; explaining *Ex parte Rooke, in re Purvis*, 56 L.T., 579.

(c) *In re Easton, ex parte Davies*, 8

Morrell, at p. 171.

(a) *Vide ibid.*

(b) *In re Desportes*, 10 Morrell, 40.

(c) *Vide In re Franks, ex parte The Official Receiver*, 9 Morrell, 90.

(d) *Vide In re Goldsmith*, 5 V.L.R. (I.), at pp. 21 and 22.

**CHAP. VII.** ments if he does not sufficiently recollect them his memory should be refreshed by their being repeated to him (*e*).

Admissibility of depositions as evidence.

Against third persons.

The Acts afford the insolvent no protection from the consequences of his answers, and his depositions are admissible as evidence against him upon a trial for an offence under the Acts (*f*), but his answers are not admissible in evidence in proceedings in the same bankruptcy by the trustee against parties other than the bankrupt (*g*). As to the admissibility of the depositions against third persons, the authority last referred to has been distinguished in a case where property in the possession of the official assignee was claimed by a third party who had notice of the examination of the witnesses and was served with notice of the assignee's intention to use the depositions upon the hearing of the claim (*h*). The depositions should be complete, that is signed and subscribed (*i*).

The depositions of the insolvent are also necessarily admissible in a certificate application, as the judge is obliged to read them whether the same is opposed or not (*k*). A deposition of a witness taken for one purpose may be used against him as an admission in any other proceeding in the matter of the same bankruptcy (*l*), and the depositions of a witness are admissible in evidence in an action against him (*m*). The whole of the the depositions must be put in, and as such are regarded as evidence (*n*).

As to suggested answers.

As to suggested answers it is necessary to see carefully whether the language used in answer to the questions is suggested by counsel, and merely re-echoed by the witness or whether it is the language of the witness in order to express his own idea for where the language of the answer has been put in the mouth of the witness by reason of the form in which the question is put to him the value of what is got out of him in such answers is always lessened (*o*). *Vide* also as to the admissibility of depositions, Chapter XI., *post*.

(*e*) *Vide Ex parte Legge*, 22 L.J. Q.B., 345.

(*f*) *Reg. v. McCooey*, 5 V.L.R. (L.), 38.

(*g*) *In re Brunner*, 19 Q.B.D., 572.

(*h*) *In re Gavacan*, (1894) 1 Ir. R., 183, Bank.

(*i*) *Vide Reg. v. Kean*, 20 L.T., 498.

(*k*) S. 138, Act of 1890, and *In re Gold-*

*smith*, 5 V.L.R. (I.), 18.

(*l*) *Ex parte Hall*, in *re Cooper*, 19 Ch. D., 580.

(*m*) *Davey v. Bailey*, 10 V.L.R. (E.), 240.

(*n*) *Vide ibid*.

(*o*) *In re Tillet*, *ex parte Harper*, 7 Morrell, at p. 291.

On an application being made under s. 19, 32 & 33 Viet. c. 71, on which s. 128 of the Act is based, for the examination of the debtor to answer certain enquiries, and to submit to a medical examination for life assurance, it was held that the provisions of the section apply to an examination of the debtor in respect of property, and that the Court could not under the section make an order for the personal examination of the debtor as to his state of health with a view to assurance (*p*).

Personal  
examination of  
insolvent.

Under s. 27 of the *Bankruptcy Act* 1883 (compare s. 135, Act of 1890) a debtor is not entitled to attend an examination by the Court of witnesses as to the debtor's dealings in property (*q*).

Right of debtor  
to attend  
examination of  
other witnesses.

If a witness required to produce documents refuses to produce them, having no lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may by warrant cause such person to be apprehended as in the case of a person refusing to come before the Court at the time appointed (*r*). The powers of the Court to compel discovery touching the estate and trade of an insolvent are peculiar and exceptional, and the production of documents may be enforced on examination which possibly could not be demanded in another jurisdiction (*s*), and a person such as a solicitor having a lien cannot refuse to produce documents at the instance of the assignee for the purpose of evidence as to the insolvent's affairs on an examination (*t*). When the trustee is a party to legal proceedings in consequence of the disability of the debtor, he has no greater right than the person in whose place he stands, and therefore the lien which would operate against the debtor if he sought for the production, holds equally against the trustee. In an examination it is otherwise, because the trustee does not appear in such a capacity, but as the agent for the creditors to make inquiries for them as to the mode in which the estate has been dealt with. The result of the authorities is that where the party requiring production is the person against whom the lien is claimed the solicitor may insist on his right and keep back the documents until the lien is

Production of  
documents.

(*p*) *In re Garnett, ex parte Official Receiver*, 2 Morrell, 286.

(*q*) *In re and ex parte Beall*, 1 Mans. 203; (1894) 2 Q.B., 135.

(*r*) S. 135, Act of 1890.

(*s*) *McKay v. Bell*, 3 A.J.R., 98; and vide *In re Sinclair, ex parte Watson*, 15 V.L.R., at p. 741.

(*t*) *McKay v. Bell, ante*.

CHAP. VII. satisfied, but if it is a third party who calls for them the lien does not avail as a ground for withholding them (*u*).

#### 5.—POWER TO ORDER INSOLVENT TO FILE ACCOUNTS.

The insolvent must (*vide* s. 128, Act of 1890) do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors as may be reasonably required by the trustee or may be prescribed by rules of Court, or be directed by the Court by any special order or orders made in reference to any particular insolvency or made on the occasion of any special application by the trustee or any creditor. S. 128 is adapted from s. 19 of 32 & 33 Vict. c. 71, and it was held such gives the Court power to order the bankrupt to file a cash account of his receipts and payments for a specified period before his bankruptcy. Jessell, M.R., in quoting the words above, observed:—"The words 'in relation to his property' are very large, and they mean any-thing in the shape of an account or statement or anything else 'which the Court may reasonably require' (*v*).

Discretion of Court.

Inability to file accounts.

The Court, however, has a discretion in the matter, and such an order ought not to be made as a matter of course but only under special circumstances (*v*). It is no argument against an order to file accounts that it will cost money to obey it. The Act compels a bankrupt to do a great many things which cost money, and the Legislature when it made such provisions knew perfectly well that somehow or other bankrupts do find money for all these things, though no doubt it is true theoretically a bankrupt ought to have no money (*w*). It may happen that an insolvent is unable to comply with the order, as where he was ordered to file accounts of a business which he swore on examination was not his, but was disbelieved. On appealing from such order, the appeal was disallowed, and it was held that if an application were made to the Court to commit for disobedience to the order it would be open to him on such to prove that the business was not his (*x*).

The accounts must necessarily be verified.

(*u*) *McKay v. Bell*, ante; and *vide* *In re Toleman*, ex parte *Bramble*, 13 C.D., 885.

(*v*) *Ex parte* and *in re Moir*, 21 C.D.,

pp. 61 and 66.

(*w*) *Vide ibid*, at p. 65.

(*x*) *In re* and *ex parte Cronmire*, (1894) 2 Q.B., 246.

The Court has no jurisdiction to order a witness other than **CHAP. VII.**  
the insolvent to furnish accounts in writing (y).

As to other  
witnesses.

6.—COMMITTAL OF INSOLVENT AND WITNESSES.

If the insolvent wilfully fail to submit to such examination in respect of his property or his creditors as may be reasonably required by the trustee, or may be prescribed by the rules, or ordered by the Court, he is in addition to any other punishment to which he may be subject guilty of a contempt of Court, and may be punished accordingly (z); and further, if an insolvent at the examination sitting or any adjournment thereof, or if the insolvent, his wife or any other person at any examination upon any summons under s. 135, Act of 1890, or any adjournment thereof, being thereunto required refuse to lodge a true inventory of his estate and effects, or to surrender the books, papers, writings, documents, bills or vouchers relating to his estate, or at such sitting or upon such summons refuse to be sworn, or refuse to answer any lawful question touching any of the matters referred to in the section, or refuse to sign or subscribe the examination (i.e. depositions) not having any lawful objection allowed by the Court, the Court may commit the witness to such prison as it shall think fit without bail until the witness submits (a). The Court may commit the insolvent or any other person to prison for any term not exceeding one month, for prevarication or evasion while under examination (b).

Committal of  
witnesses.

The form of application for committal is No. 131, Appendix, *post*; affidavit in support of application for committal under s. 128, Act of 1890, is form No. 132; the notice of application is form No. 133, and order for committal No. 134, Appendix, *post*. For the form of warrant, *vide* Nos. 136, 139 and 141, Appendix, *post*; where the person is committed for refusing to answer any question every such question must be set out in the warrant (c).

Forms as to  
committal.

When any person has been committed under such part of the Act (d) for refusal to answer, or for prevarication or evasion, he may make application to the Supreme Court or a judge of that

(y) *Ex parte and in re Reynolds*, 21 C.D., 601; and *vide In re Sinclair, ex parte Watson*, 15 V.L.R., at p. 742.  
(z) S. 128, Act of 1890.

(a) S. 135, *ibid*.  
(b) *Ibid*.  
(c) S. 137, *ibid*.  
(d) Part VII

## CHAP. VII.

Application to  
Supreme Court.

Examination  
may be  
considered as a  
whole.

Court to be discharged from such commitment, and if there does not appear any insufficiency or informality in the form of the warrant, the Court or judge may and is required to re-commit such person to the same prison to remain there until he conform unless it appear that the person committed has fully answered all lawful questions put to him on his examination, or if such person was committed for refusing to be sworn or for not signing his examination, unless it appear that he had sufficient reason for the same (e). The whole examination of such party, whereof any such question was a part, may be considered by the Court or judge, and if it appears from the whole examination that the answer or answers of the party committed is or are satisfactory, the party so committed may be discharged (f). The depositions are treated as the proper evidence in such an application, and affidavits as to questions put cannot be received (g).

## 7.—PRACTICE IN EXAMINATION BEFORE POLICE MAGISTRATE.

Any police magistrate at the city, town or place where the proceedings in any estate are conducted, if he is satisfied on the written application of the assignee or trustee that it is necessary or expedient in order to prevent unnecessary expense or delay, or for any other reasonable cause so to do, has and may exercise all the powers which the Court had under ss. 134, 135, 136 and 137, Act of 1890, before the commencement of the Act of 1897 (h). It will be noticed that as the powers of the police magistrate are restricted to those the Court had under the said ss. 134, 135, 136 and 137, before the commencement of the Act of 1897, examinations under deeds of arrangement, Part VI. of the latter Act, and in compositions, Part V. of the same Act, cannot be held before him. The advertisement and other notification of, and the mode of conducting any examination before a police magistrate must be as nearly as practicable the same as if such examination took place before the Court. Any order made by a police magistrate under the powers conferred by the section is subject to appeal therefrom as if such order were made by the Court, and all the provisions of the Insolvency Acts relative to

(e) S. 137, *ante*.

(f) *Ibid*, *vide Ex parte Lord*, 16 M. & W., 462, and *In re Ward*, 15

L.J. Q.B., 233.

(g) *Ex parte O'Hare*, 1 V.L.T., 227.

(h) S. 112 (1), Act of 1897.

appeal are applicable thereto. The police magistrate must sign **CHAP. VII.** all evidence given before him and forthwith transmit the same, together with any documents or other exhibits produced in evidence before him, to the Court (*i*). Signing of evidence.

As to the power of the Court in reference to such examination, *vide* p. 200, *ante*. Power of Court as to such examinations.

#### 8.—EXAMINATION IN CASES OF LIQUIDATION BY ARRANGEMENT.

S. 135, Act of 1890, contains the words "or the commencement of the liquidation," and having regard to this and s. 153 (VII.) of that Act there is apparently power given to the Court to examine the liquidating debtor and other persons under s. 135, referred to.

#### 9.—EXAMINATION IN CASES OF COMPOSITION.

After the presentation to the chief clerk of any extraordinary resolution the Court has the same powers, authority and jurisdiction to examine or direct the examination of any person whomsoever as it has in case of insolvency (*k*).

#### 10.—EXAMINATION UNDER DEEDS OF ARRANGEMENT.

The provisions of the Insolvency Acts as to the payment of certain claims as preferential, and as to the proof of debts, and as to the respective rights of secured and unsecured creditors, and as to the examination of the debtor or any other person, apply to every deed of arrangement duly registered (*l*).

#### 11.—EXAMINATION UNDER THE COMPANIES ACT 1890.

The examinations under the Insolvency Acts are concerned only with the dealings, estate or effects of persons, and when it is necessary to hold similar investigations as to companies recourse is had to the powers conferred upon the Supreme Court by the *Companies Act* 1890, s. 109, the object of which is to assimilate the practice in winding up to the practice in insolvency (*m*). The judges of the Court of Insolvency, County Court and Court of Mines are commissioners for the purpose of taking evidence (*n*), Practice assimilated to that of insolvency.

(i) *Ibid.*

(k) S. 73 (11), Act of 1897.

(l) S. 79, Act of 1897.

(m) *In re Gold Company*, 12 C.D., at p. 85.

(n) *Companies Act* 1890, s. 113.

**CHAP. VII.** and any officer of the company or any person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the Supreme Court may deem capable of giving information concerning the trade dealings, estate or effects of the company, may be dealt with in very much the same manner as witnesses under the 135th section of the Act of 1890.

Judge's  
discretion as to  
the examination.

The section gives the judge directing the examination discretion both as to the extent of the examination and as to the occasions on which it will be ordered and also as to the persons who are to conduct it. It is the better and usual course to entrust the examination to the liquidator, but there may be some cases in which he declines to interfere or some creditor or contributory may think that he or his agents ought not to examine in a particular case and the judge may commit either the whole or some part of the examination to some creditor or contributory (o). As a rule when committing an examination to some creditor or contributory the judge points out the extent and limits of that examination, but it may, in many cases, be difficult to see beforehand how far an examination should be properly carried, and therefore it is left within his discretion as to the limits he may think proper to impose in each case, and appeals from the discretion of a judge are confined to cases where there has been a gross miscarriage (p). If jurisdiction exists to make the order a witness has no *locus standi* to appeal against the order (q).

Appeal from  
order.

Application is  
*ex parte*.

The application to summons the witness is made under s. 109 of the *Companies Act* 1890, *ex parte*, as it is undesirable that the liquidator should put anything on the files of the Court which can be inspected by the person against whom he intends to proceed, and which if so inspected might afford information which would enable him to defeat any proceeding to be taken against him (r). Every commissioner, in addition to any power of summoning and examining witnesses and requiring the production or delivery of documents and certifying or punishing defaults by witnesses which he might lawfully exercise as a judge of the Court

Powers of  
commissioners.

(o) *Per* Jessel, M.R., *In re Silkstone and Dodworth Coal and Iron Company*, *Whitworth's case*, 19 C.D., at p. 120.

(p) *Ibid.*, p. 121.

(q) *Ibid.*

(r) *In re Mutual Live Stock Financial and Agency Company*, 13 V.L.R., at p. 92. In this case a form from which the order can be adapted is given.



of Insolvency or judge of a County Court or Court of Mines, has in the matter so referred to him all the same powers of summoning and examining witnesses and requiring the production or delivery of documents and punishing defaults by witnesses and allowing costs and charges and expenses to witnesses as the Court which made the order for winding up the company has (s). CHAP. VII.

The examination is upon oath either by word of mouth or upon written interrogatories, and the answers of the witness may be reduced into writing and the witness may be required to subscribe the same (t). The examination before an examiner, it has been held, is private, for the place where the examiner sits is not a public Court but a mere office, and the public has no right to be present and the examiner has no discretion as to admitting them (u). The question as to whether there is power to conduct the examination in public was considered in the case *In re The City of Melbourne Bank, in liquidation* (v), and on perusal of the authorities it was thought that they were sufficient to raise a very substantial doubt as to whether the examination should not be in secret in the absence of an express order to the contrary. An order in this case was made by the judge in the exercise of his discretion for the examination to be held in public, subject to the discretion of the commissioner to hold the same in private. The Court has discretion to allow a creditor or contributory to attend (w). As to the conduct of the examination the practice in insolvency is followed so far as it is found to be reasonable (x). Any person who has been tendered a reasonable sum for expenses refusing to attend at the time appointed and having no lawful impediment known and allowed at the time may be apprehended and brought up for examination (y), and in any case of a refusal to attend or be sworn or objecting to answer, it has been held he may be ordered to pay the costs of such refusal or objection (z). The only privileged answers are those which may tend to criminate and those of professional confidence, and if the question involves disclosures of matters with which the

Nature of the examination.

As to witnesses and evidence.

(s) *Companies Act* 1890, s. 113.

(t) *Companies Act* 1890, s. 110.

(u) *Vide In re Great Western of Canada Oil, &c., Company*, 6 C.D., 109; *Re Greys Brewery Company*, 25 C.D., 400.

(v) 2 A.L.R., 65.

(w) *Vide Re Greys Brewery Company*, ante.

(x) *Ibid.*

(y) *Companies Act* 1890, s. 109.

(z) *Vide In re Lisbon Steam Tramways Company*, 2 Ch. D., at p. 583.

**CHAP. VII.** litigant parties have nothing to do the witness may appeal to the judge to release him from answering the question, but the decision of the judge ought to be final and not subject to appeal (a). The witness has the right to be re-examined on his own behalf and for that purpose he is entitled to have counsel and solicitor present, but the re-examination must be limited to matters respecting his examination in chief and for such specific purpose only his counsel and solicitor are entitled to make and carry away notes (b), and the liquidator's clerk is also permitted to take notes for the cross-examination of the witness, but they must be destroyed immediately after the cross-examination (c).

Return of  
examination.

The examination when taken is returned or reported to the Court which made the order for the winding up of the company in such manner as it directs (d).

(a) *Vide In re Silkstone and Dodworth Coal, &c., Company, Whitworth's case*, 19 C.D., at p. 121.

(b) *In re Cambrian Mining Company*,

20 Ch. D., 376.

(c) *In re Heseltine & Son, Limited*, W.N. 1891, p. 25.

(d) *Companies Acts 1890*, s. 113.

## CHAPTER VIII.

### DISCHARGE OF INSOLVENT.

#### I.—BY CERTIFICATE OF DISCHARGE.

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| 1. <i>Voluntary Certificate Applications.</i>  | <i>fusing or Suspending Certificate.</i>     |
| 2. <i>Opposition to Applications.</i>          | 5. <i>Form and Effect of Certificate.</i>    |
| 3. <i>Compulsory Certificate Applications.</i> | 6. <i>Appeal from Certificate Decisions.</i> |
| 4. <i>Powers of Court as to Granting, Re-</i>  | 7. <i>Certificates under Old Law.</i>        |

#### II.—BY RELEASE OF INSOLVENT ESTATE.

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| 1. <i>Releases under ss. 131 and 132, Act of 1890.</i> | 2. <i>Effect of Release Order.</i> |
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#### I.—BY CERTIFICATE OF DISCHARGE.

##### 1.—VOLUNTARY CERTIFICATE APPLICATIONS.

After the expiration of three months (a) from the date of the order of sequestration the insolvent is at liberty to advertise his intention to apply for his certificate of discharge (b), but before applying for an appointment he must file an affidavit stating that three months have elapsed since the date of the order of sequestration, and that his estate has paid or will pay seven shillings in the £ to all his creditors (c). If the estate cannot pay seven shillings in the £ he must proceed under r. 306, *vide* p. 376, *post*. An insolvent intending to apply for a certificate of discharge, must make his application to the Court in writing in the form No. 58 in the Appendix, *post*, with such variations as circumstances may require, and the Court then appoints a day for hearing the application in open Court (d). Notice of the appointment by the

Procedure by applicant.

Preliminary affidavit.

Application to fix day  
Form of same.

(a) Calendar months, *vide* *Acts Interpretation Act 1890*, s. 5.  
(b) S. 138, Act of 1890.

(c) R. 305.  
(d) R. 293.

**CHAP. VIII.** Court of the day for hearing the application for a certificate in the form No. 61 in the Appendix, *post*, must, twenty days before the day so appointed be sent by prepaid post letter to each creditor, as to those creditors who have proved in the insolvency, to the address given in the creditors' proof, and as to those creditors who have not proved to the address appearing in the insolvent's schedule, and the notice to be published by the insolvent in the *Government Gazette* of the day appointed by the Court for hearing the application must be signed by the insolvent, and is in the form No. 59 in the Appendix, *post*, with such variations as circumstances may require (*e*). The time and place must be advertised in the *Government Gazette* (*f*). The advertisement must state that it is the insolvent's intention on the day named therein as appointed which day must be not less than twenty nor more than thirty days from the day of publication (*g*) of such to apply to the Court for a certificate of discharge (*h*). The insolvent must also give twenty days' notice in writing to the assignee or trustee of his estate of his intended application, and of the time when it is to be made, and the application is heard on such day, and on any day or days of adjournment therefrom (*i*). R. 295 also provides that notice of the time and place appointed by the Court for hearing the application for his certificate must be given by the insolvent to the trustee not later than twenty days before the time so appointed. Such notice may be given by a registered letter sent by post to the last known address of the trustee. A form of notice to the trustee is No. 60, Appendix, *post*.

Notices and  
advertisements.  
Forms of same.

Advertisement.

Notice to  
trustee.

Form of same.

Affidavit in  
support and  
form of same.

Not less than three days before the day appointed by the Court for hearing the application the insolvent must file in the Court an affidavit in the form No. 62 in the Appendix, *post* (so far as such form is applicable), stating therein that twenty days before the day so appointed the notices to creditors and the notice to the trustee required by rr. 294 and 295 have been duly sent as prescribed by the said rules. The insolvent must also at the same time leave with the chief clerk a copy of the *Government Gazette* containing the publication of the notice prescribed by s. 138, Act of 1890, and the chief clerk must thereupon file with the pro-

(*e*) R. 294.

(*f*) S. 138, Act of 1890; *vide* r. 294,  
and form 59.

(*g*) As to time, see p. 47 hereof, and

*Watson v. Issell*, 16 V.L.R., 607.

(*h*) S. 138, Act of 1890.

(*i*) *Ibid*.

ceedings the page of the *Government Gazette* in which such notice is published (*k*). CHAP. VIII.

On the hearing of an application by an insolvent for a certificate of discharge, if the same be not opposed, the Court may take into consideration the depositions (if any), of the insolvent and any written report made to the Court by the trustee or official accountant as to the conduct and affairs of the debtor and any evidence the insolvent may bring forward, and if the insolvent desire it, and the Court thinks fit, it may direct the chief clerk to furnish the insolvent with notice in writing of matters requiring explanation, and after such explanation (if any), the Court decides upon the application in accordance with the acts (*l*). Evidence in addition to depositions of the insolvent already taken and the trustee's report and official accountant's report (if any), may be given *viva voce* in open court, but the Court may allow affidavits to be used or the whole or part of the evidence to be taken on commission (*m*). The insolvent must attend the Court on the day appointed for hearing the application, and on any day or days of adjournment, unless the Court otherwise orders, and if he fail to attend without reasonable excuse he is deemed guilty of contempt of court, and may be punished accordingly (*n*). Consideration of depositions and trustee's report.  
Further evidence.  
Attendance of insolvent.

On any voluntary application the Court may examine or permit any creditor or the insolvent to examine the trustee on oath as to the insolvent's conduct and affairs (*o*). In every case of an application by an insolvent for a certificate the trustee must file a report which must be signed by him and filed in the Court seven days before the day appointed for hearing the application. Such report must afford the fullest possible information with regard to the insolvent's conduct and affairs and the cause of his insolvency, and must state either that the insolvent did keep proper books in the business or occupation carried on by him, and the name and character of such books, or if he did not keep proper books the report must specify the books which in his opinion should have been kept by the insolvent, and must state clearly the names and characters of those which the insol- Trustee may be examined.  
Trustee's report.

(*k*) R. 296.

(*l*) R. 299; s. 92, Act of 1897.

(*m*) R. 303.

(*n*) R. 304.

(*o*) S. 91 (1), Act of 1897. The section also applies to "compulsory applications," *vide* same, *post*.

**CHAP. VIII.**

Insolvent may  
dispute report.

vent has omitted to keep. It is the duty of the trustee whether the report is favorable or otherwise to bring under the notice of the Court all facts which the Court ought to have in mind in considering whether a certificate should or should not be granted. It is not sufficient for the trustee to say that he knows of no reason why a certificate should not be granted (*p*). Where an insolvent intends to dispute any statement with regard to his conduct and affairs contained in the trustee's report he must, not less than two days before the hearing of the application for a certificate, give notice in writing to the trustee specifying the statements in the report (if any) which he proposes at the hearing to dispute. Any creditor who intends to oppose the certificate of an insolvent on grounds other than those mentioned in the trustee's report must give notice of the intended opposition stating the grounds thereof, to the trustee not less than two days before the hearing of the application (*q*).

Affidavit where  
estate does not  
pay seven shill-  
ings in the £.

Notices as to  
same.

Application for  
dispensation.

If an insolvent cannot truly state that his estate has paid or will pay seven shillings in the £ to all his creditors he must, instead of filing the affidavit required by r. 305, file an affidavit setting out the true circumstances of his case and that his estate has not and will not be able to pay seven shillings in the £, and he must serve notice upon the trustee and the official accountant and each creditor not less than twenty-one days before the day appointed for the hearing of the application for a certificate that he intends to apply to the Court upon the day appointed for such hearing to dispense with the condition mentioned in s. 139, Act of 1890, and the trustee and the official accountant and any creditor who has proved his claim may be heard in opposition to such application to dispense with such condition (*r*). Such application must be heard upon affidavit; all depositions of the insolvent already taken in the estate and the trustee's report and the official accountant's report (if any) may be read, and the Court may postpone its decision upon such application until it has heard the application for a certificate, and the Court may adjourn the hearing of any application for a certificate to give an opportunity of compliance with the condition of paying seven shillings in

(*p*) S. 91 (4), Act of 1897; r. 297.

(*q*) R. 298; *sed vide* s. 91 (2), Act of 1897, and r. 300.

(*r*) R. 306; *vide* form 60, Appendix, *post*.

the £ (s). It is necessary that the proof adduced in support of such an application should be given with some accuracy as to the details of losses, and the insolvent should show in his affidavit clearly and intelligibly his financial history (t), and if he alleges in his application that certain property, which he valued in his schedule as assets at a particular value, has since become valueless, he must prove to the Court's satisfaction how that is so (u). General statements of deterioration in landed property have been held insufficient. Particular losses, not attributable to recklessness or gross improvidence, should be shown (v). Where the insolvent identified his transactions, including valuations and persons, and gave dates and amounts, and the trustee said that on the application he had the amplest opportunities of obtaining information and that he was entirely satisfied with the result, it was held that sufficiently full verification had been given (w). In certain cases the proof cannot consist solely of the unsupported testimony of the insolvent, for example when the insolvent commenced business as an estate and commission agent two years before his insolvency, and was engaged largely during that time in floating companies, in buying shares in companies, and in selling shares on commission for promoters of companies, and losses in connection with several of the companies and the failure to pay of persons who employed him were alleged in his affidavit (x). A statement to the effect that squatting properties had seriously depreciated in value and that the insolvent had paid and been charged with heavy interest and discounts and had sustained losses by droughts and flood is a case which also required corroboration (y).

When corroboration necessary.

The circumstances which excuse the payment of seven shillings in the pound are those for which, in the opinion of the judge, the insolvent cannot justly be held responsible (z), and the words mean as to circumstances some unusual misfortune and do not include rash inconsiderate speculations, dealing in a gambling way with mining shares, or purchasing a business requiring capital to carry

(s) R. 307.

(t) *In re Dyte*, 2 V.L.R. (I.), at p. 47, 48. *Vide also In re Fisher*, 1 A.L.R., 99.

(u) *In re Wenton*, 12 V.L.R., 715.

(v) *In re Arnold*, 5 V.L.R. (I.), 39.

(w) *In re Davies*, 20 V.L.R., 505; 16 A.L.T., 121.

(x) *In re Abraham*, 16 V.L.R., 706.

(y) *In re Fisher*, 1 A.L.R., 99.

(z) S. 139, Act of 1890.

**CHAP. VIII.** it on where the purchaser has not that capital (a). The cases referred to below showing where dispensation of the statutory dividend was allowed or refused may be useful as indicating the circumstances under which the Court has granted a clear certificate or otherwise (b).

Limitation of time as to applications.

An application for a certificate is not entertained by the Court after the expiration of twelve months from the date of the order of sequestration unless notice of intention to apply has been duly advertised before the expiration of the said period, except by leave of the Court upon such terms (if any) as the Court may think fit (c). The practice of the Court in such applications is to require the present procedure necessary in an ordinary application to be acted on, as it involves notices to all parties and affidavits as to same. A form of order giving leave to insolvent to apply for a certificate is No. 65, Appendix, *post*.

Practice on application after expiration of twelve months.

Directions as to order.

The order of the Court made on an application for a certificate of discharge must not be delivered out until after the expiration of the time allowed for appeal, or if an appeal be entered until after the decision of the Supreme Court thereon. The order must be dated the day on which it is made, but it does not take effect until it has been delivered out. As soon as the order has been delivered out, the order takes effect as from the day of its date (d). The order must be in one of the forms in the Appendix, *post*, as the case may require. The form of order granting a certificate unconditionally is No. 66, the order refusing dispensation is form No. 67; the order suspending certificate is form No. 68; the order for certificate subject to conditions is form No. 69, and the order refusing certificate is form No. 70, Appendix, *post*. The form of certificate is No. 71 in the Appendix, *post*, with such variations as circumstances may require (e).

Forms of orders as to certificates.

Form of certificate.

(a) *Vide Re Dyte*, 2 V.L.R. (I.), at p. 47.

(b) *Re Fleming*, 12 V.L.R., 719. *Re Davies*, 17 A.L.T., 260; 2 A.L.R., 37. *Re Davies*, 20 V.L.R., 502; 16 A.L.T., 121. *Re Dyte*, *ante*. *Re Stocks*, 4 A.J.R., 173. *Re Kershaw*, 1 V.L.R. (I.), 44. *Re M'Intyre*, 11 V.L.R., 313. *Re Cabena*, 17 A.L.T., 286; 2 A.L.R., 86. *Re M'Lachlan*, 3 A.L.R., 240. *Re Dixon*, 5 A.J.R., 171. *Re Trezise*, 9 A.L.T., 58. *Re Cunningham*, 2 V.L.R. (I.), 9. *Re Martin*, 7 V.L.R.,

119. *Re Fisher*, 1 A.L.R., 99. *Re Millikin*, 4 V.L.R. (I.), 71. *Re Monaghan*, 10 V.L.R. (I.), 9. *Re Michael*, 5 A.J.R., 64. *Re Heath*, 8 V.L.R. (I.), 10. *Re Wright & Higgins*, 7 V.L.R. (I.), 7.

(c) S. 144, Act of 1890. As to the absence of limitation of time in the earlier Acts, *vide In re Tyrer*, 4 V.L.R. (I.), at p. 17. *Vide p. 379* as to renewed applications.

(d) R. 310.

(e) *Vide ibid*.



An insolvent is not entitled to have any of the costs of or incidental to his application for a certificate of discharge allowed to him out of his estate. The Court may make such order as to the costs incurred by the trustee or the official accountant or any creditor of and incidental to the insolvent's application for his certificate of discharge as the Court may think fit (*f*), and if at the hearing of any application for a certificate of discharge, it appears to the Court that all costs, charges and expenses of the assignee and trustee allowed by the Court or by the rules have not been paid, the judge may adjourn the hearing of the application until such costs, charges and expenses have been paid (*g*).

CHAP. VIII.

Costs as to certificate.

Power to adjourn until costs, charges and expenses are paid.

As to accounts of after acquired property and verification of statements as to the same class of property, *vide* Chapter VI., at p. 342, *ante*.

Insolvent's duties as to after-acquired property.

Any insolvent may apply for a certificate from time to time unless the Court on any application fixes the period within which he shall not be entitled to make such application (*h*). Under the Act of 1890, it has been held that the refusal of a certificate does not prevent the insolvent re-applying and obtaining a re-hearing, as there is jurisdiction to re-hear if the judge thinks fit in the exercise of his discretion to hear it, as each case depends upon its merits (*i*). In practice leave has generally been given to re-apply, and in such case a judge of the district to which the proceedings are removed has jurisdiction to entertain the renewed application (*k*).

Renewed applications for certificate and re-hearing.

## 2.—OPPOSITION TO APPLICATIONS.

The trustee or official accountant or any creditor who has proved his claim, may, without notice to the insolvent, oppose the insolvent's application for a certificate of discharge, and the trustee and creditor referred to may examine him on oath as to any matter or thing relating to his estate, and as to his transactions and conduct, and as to the causes of his inability to pay his debts (*l*). A creditor who has not proved cannot be heard. No

Opposition without notice and examination of insolvent.

Consolidation of oppositions.

(*f*) R. 311.

(*g*) R. 309.

(*h*) S. 94, Act of 1897; *vide ante*, at p. 378, as to applications after the expiration of twelve months.

(*i*) *In re Murphy*, 8 V.L.R. (I.), 15; *In re McIntyre*, 11 V.L.R., 312; *Re Hunter*, 1 A.L.R., 73, C.N.; *Re Wat-*

*son*, 2 A.L.R., 210; *In re Gale*, 7 V.L.R. (I.), 1.

(*k*) *In re Hinneberg*, 8 V.L.R. (I.), 7.

(*l*) S. 91 (2), Act of 1897; s. 138, Act of 1890; r. 300. R. 298, *vide ante*, at p. 378, states that any creditor who intends to oppose the certificate of an

**CHAP. VIII.** proof no status (*m*). Oppositions to an application for a certificate of discharge may be consolidated by order of the Court (*n*).

Adjournment of such hearing and notice of objections thereunder.

The Court may adjourn the hearing of an application for a certificate of discharge as it thinks fit, and may require the trustee or any opposing creditor to furnish the insolvent before the time appointed for the adjourned hearing with written notice of the grounds of opposition (*o*). The form of notice, when so required, is No. 63, Appendix *post*. Specific, not general charges, should be made, as for example, where a fraudulent preference is alleged the names of the creditors preferred, the nature of the property, etc., should be given. Such details should be given as to enable the insolvent to know the precise charges he has to meet (*p*). Where the notice was improperly drawn and did not disclose any offence, an adjournment to enable a fresh notice to be given was refused (*q*), and where the objections were vague it was held an amendment should be asked for by the person opposing (*r*). Such objections as "that he had wilfully delayed sequestrating his estate in order to benefit or assist one or more of his creditors;" "that he had not made a full and fair disclosure of his property;" "that he had given others a fraudulent preference," have been struck out on the ground that they were too vague (*s*), and the objection, "that his conduct both before and after sequestration had been fraudulent and culpably negligent" was also held to be too vague (*t*).

Hearing of opposed applications.

If an application for a certificate be opposed the person opposing opens his case and gives such evidence in addition to depositions of the insolvent already taken if he relies upon any such depositions as he may think fit, and after he has closed his case the insolvent opens his and gives such evidence as he may think fit and sums up the same. The person opposing may reply. If the insolvent intends to give no evidence he must state his

insolvent on grounds other than those mentioned in the trustee's report must give notice of the intended opposition, stating the grounds thereof to the trustee not less than two days before the hearing of the application.

(*m*) *In re Ditchburne*, 2 V.L.R. (I.), 49; *In re Farrell*, 4 A.J.R., 101.

(*n*) R. 301.

(*o*) S. 91 (3), Act of 1897.

(*p*) *In re Dixon*, 5 A.J.R., 171; *vide* also *In re Caulfield*, 10 V.L.R. (I.), 73; and *In re Perry*, 1 W. & W. (I.), at p. 155.

(*q*) *Re M'Grane*, 1 A.L.T., 120.

(*r*) *Vide In re Kershaw*, 1 V.L.R. (I), at p. 49.

(*s*) *Ibid*, at p. 45.

(*t*) *Ibid*, at p. 49.

intention, and the person opposing then sums up his evidence and the insolvent may reply (*u*). CHAP. VIII.

The insolvent may be examined on oath as to any matter or thing relating to his estate and as to his transactions and conduct and as to the causes of his inability to pay his debts by the trustee or any creditor who has proved his claim and who opposes the application (*w*). The practice of the Court prior to the Act of 1897 was to allow the insolvent to give evidence on oath if he desired to, but he was not compelled nor was he obliged to submit himself for cross-examination by the party opposing. In the application for dispensation he could be cross-examined on his affidavit, but as such was a distinct and separate application to that for a certificate it did not affect the practice of not permitting the insolvent to be examined on the certificate application, therefore in an unconditional certificate application there were two branches, one an application for a certificate and the other as now by the rules, an application for dispensation. As to the former the insolvent could not be cross-examined, as to the latter on his affidavit in support he could (*x*). Where such cross-examination took place it was stated (*y*) that it practically meant that the opposing creditor could insist on cross-examining the insolvent not only with regard to the dispensation but also with a view to support the objections lodged, and that the effect of such would be to compel the insolvent to give evidence to support criminal charges against himself. The practice of the Court in disallowing cross-examination on a certificate application where the insolvent in the objections was charged with an indictable offence was in conformity with the *Crimes Act* 1891, s. 34, to the effect that a person charged with an indictable offence cannot be called as a witness without his consent (*z*).

(*u*) R. 302.

(*w*) S. 91 (2), Act of 1897.

(*x*) *Re McIntosh*, 1 A.L.R., 171, following *Re Dixon*, 5 A.J.R., 171; *Re Farrar* (unreported), and *Re Duff*, 17 A.L.T., 35.

(*y*) *In re Duff*, 17 A.L.T., 35.

(*z*) The practice of Noel, J., was to regard the insolvent as a person who was not a competent witness either for or against himself in such a case (*In re Jones*, 2 A.L.T., 58) and diverse views were taken by the Supreme Court

judges, Molesworth, J. (*In re Paterson*, 7 V.L.R. [I.], 14, and *vide in re Arnold*, 5 V.L.R. [I.], 39), holding that an insolvent on a certificate application might be examined on his own behalf but could not be compelled to be examined. Higinbotham, J. (*In re Aarons*, 6 V.L.R. [I.], 56), held that an insolvent had a legal right to be examined on oath, and Barry, J. (*ibid*), that the insolvent had a right to make an unsworn statement, but not to be sworn and examined as a witness.

Examination  
and cross-  
examination of  
insolvent.

## CHAP. VIII.

Court may hold insolvent to bail in opposed application.

Form of warrant.

Renewal of bail.

In opposed applications the Court may require the insolvent to find bail with two sufficient sureties to attend upon the day appointed for giving judgment on such application, or in default may commit the insolvent to prison until the day so appointed (*a*). The form of warrant is form 142, Appendix, *post*. Where an insolvent has given bail to attend upon the day appointed for giving judgment upon his application for a certificate of discharge, or has been committed in default of bail, if for any reason the Court is not prepared to give judgment on the day first appointed the Court may alter such day, and in such case the insolvent may be again called upon to find bail, and in default thereof may be again committed (*b*).

Corrupt forbearance to oppose.

Any contract, covenant or security made or given by an insolvent or other person with, to or in trust for any creditor for securing the payment of any money as a consideration, or with intent to persuade the creditor to forbear opposing the certificate or to appeal against the grant of the same, is void, and any money thereby secured or agreed to be paid is not recoverable, and the party sued on any such contract or security may plead in general that the cause of action accrued after sequestration, and may give the Act and the special matter in evidence (*c*). But no such security, if negotiable, is void as against a *bond fide* holder thereof for value without notice of the consideration for which it was given (*d*).

Protection of *bond fide* holders without notice.

Penalty on person bribed.

If a creditor so obtain any sum of money or any goods, chattels or security for money from any person as an inducement for forbearing to oppose or for consenting to the allowance of the certificate of the insolvent, or to forbear to appeal against the grant of the same, every such creditor so offending is liable to pay for every such offence the treble value or amount of such money, goods, chattels or security so obtained, which may be recovered by any person upon information before and by order of the Court in the prescribed manner (*e*). The form of information in such a case is No. 145, Appendix, *post*, and the form of affidavit of the informant is No. 146. R. 129, Act of 1890 applied

Form of information and affidavit.

(*a*) S. 148, Act of 1890. 273, s. 101.  
 (*b*) R. 450. (*d*) *Ibid*.  
 (*c*) S. 147, Act of 1890—compare 5 (*e*) *Ibid*.  
 Vict. No. 17, s. 96; and 28 Vict. No.

to informations of this class, but r. 449, which has apparently been adapted from it, as the words are the same, is stated to apply to s. 14, Act of 1890, and s. 8, Act of 1897. S. 14, Act of 1890, however is expressly repealed by the later Act (*f*). CHAP. VIII.

In cases of bribery the money being paid illegally cannot be recovered back if the contract is partially or wholly performed (*g*), and bills given by an insolvent in order to have opposition to the grant of the certificate withdrawn cannot be proved on by such creditor in a second insolvency (*h*). Proof in such a case should be expunged, but where it was not the *status* of such a creditor cannot be impeached on an application for a certificate, but the manner in which the creditor acted may be regarded (*i*). Proof disallowed for bribe.

### 3.—COMPULSORY CERTIFICATE APPLICATIONS.

In the event of the insolvent not applying for his certificate within six months a judge of the Insolvency Court may on the application of the trustee or any creditor, require the insolvent, and in case of refusal or neglect compel him by warrant to appear before the Court, and the Court may then grant, refuse or suspend his certificate and punish or otherwise deal with such insolvent as if the certificate had been applied for by him (*j*). On the application by the trustee or a creditor the judge makes the order form 64, Appendix, *post*, requiring the insolvent's attendance at Court, and if he neglects or refuses to obey it the warrant, form 73, Appendix, *post*, may be issued for his attendance. The Court then proceeds to hear the witnesses (if any) produced by the trustee or opposing creditor and then the insolvent's witnesses (if any) and argument as on an ordinary application, and makes such order as it may think fit (*k*). The Court may adjourn the hearing and may require the trustee or opposing creditor to furnish the insolvent before the time appointed for the adjourned hearing with written notice of the grounds of his opposition (*m*). As the Court may, and under some circumstances must, refuse the certificate, and may award imprisonment, it is necessary that the objections should be stated with sufficient Procedure.

(*f*) *Vide* r. 449.

(*g*) *Vide* *Kearley v. Thompson*, 24 Q.B.D., 742; *Taylor v. Bowers*, 1 Q.B.D., 291.

(*h*) *In re Cunningham*, 3 V.L.R. (I.), 1.

(*i*) *In re Cunningham*, 2 V.L.R. (I.), 9.

(*j*) S. 149, Act of 1890—compare 7 Vict. No. 19, s. 23; 28 Vict. No. 273, s. 106; *vide* also r. 308.

(*k*) R. 308.

(*m*) S. 91 (3), Act of 1897.

CHAP. VIII. distinctness to enable the person charged to know the offence with which he is charged and to enable him to put forward his answer to it (*n*), but any form that gives substantial, clear and distinct notice to the insolvent of the objections taken against him is sufficient (*o*).

The insolvent in compulsorily applying for his certificate may also apply for dispensation of the condition contained in s. 139 as to the payment of the statutory dividend, in which case it is unnecessary for him to make the affidavit in support, as compulsory proceedings are distinguished from voluntary applications (*p*).

The Court may examine or permit any creditor or the insolvent to examine the trustee on oath as to the insolvent's conduct and affairs (*q*), and the insolvent's application may be opposed by the trustee or any creditor, and the insolvent may apparently be examined on oath by the trustee or any creditor as to his transactions and conduct and as to the causes of his inability to pay his debts (*r*). *Vide* generally also "Opposition to Certificate," at p. 379, *ante*.

#### 4.—POWERS OF COURT AS TO GRANTING, REFUSING OR SUSPENDING CERTIFICATE.

General powers  
of and  
procedure by  
the Court.

On any voluntary or compulsory application for a certificate of discharge the Court must take into consideration the report of the trustee and any report of the official accountant (*s*), and may, as it thinks fit:—

- (A) Grant or refuse an immediate absolute certificate of discharge; or
- (B) Suspend the certificate from taking effect for such time as it may think fit not exceeding two years; or
- (C) Suspend the certificate until such dividend (not exceeding seven shillings in the £) as it may fix has been paid to the creditors or until security for the payment of

(*n*) *In re Caulfield*, 10 V.L.R. (I.), 73.

(*o*) *In re Hall*, 14 V.L.R., at p. 631.

(*p*) *In re Frankel*, 4 A.J.R., 140.

(*q*) Act of 1897, s. 91 (1).

(*r*) *Ibid* (2), r. 308.

(*s*) By s. 138, Act of 1890, the Court must also consider the depositions (if any) of the insolvent and any evidence he may bring forward.

such dividend has been given to the satisfaction of the Court. CHAP. VIII.

If the sureties for such security have to pay the amount of dividend or any part thereof and the debtor again becomes insolvent they are not entitled to any dividend until the debts incurred by the insolvent since he obtained his certificate have been paid (*v*). The dividend is not stated to be paid out of the estate as was necessary under s. 139, Act of 1890 (*t*). Under s. 139, Act of 1890, the dividend was calculated exclusive of the ordinary cost of managing the estate (*u*).

The Court must, however, refuse to grant the certificate in all cases where the insolvent has been guilty of any offence under the Insolvency Acts, unless for special reasons it otherwise determines (*v*). The judge in granting a discharge where the insolvent has committed an offence of the kind indicated should state in his judgment the "special reasons" which determine him to grant the discharge (*w*); and where the application for a certificate was adjourned to a future date, and in the meantime the insolvent died, it was held that the Court had no inherent power to grant the application *nunc pro tunc* (*x*).

S. 143, Act of 1890, also provides that in any case if the Court is of opinion that a certificate ought not to be granted unconditionally it may grant a certificate subject to any condition touching any salary, pension, emoluments, profits, wages, earnings or income which may afterwards become due to or be earned by the insolvent, and generally touching after acquired property (*y*). As to insolvent's duty as to accounts of after acquired property, *vide ante*, at p. 342. The principle that an insolvent may be called upon to pay portion of his debts before he enjoys his income, was adopted under the earlier Acts (*z*).

In case of failure to comply with the whole or any of the conditions fixed by a conditional grant of certificate the Court may at any time grant an absolute certificate of discharge to the

Conditional  
certificate.

Absolute  
discharge  
notwithstanding  
non-compliance  
with conditions.

(*t*) *In re Fleming*, 12 V.L.R., 719.

(*u*) *Re Frankel*, 4 A.J.R., 134. *Vide* also *In re Le Febvre*, 3 A.J.R., 5.

(*v*) S. 92, Act of 1897 — compare *Bankruptcy Act* 1890, s. 8.

(*w*) *In re Stevens, ex parte Board of Trade*, 5 Manson, 222.

(*x*) *In re James*, 20 A.L.T., 126.

(*y*) S. 143.

(*z*) 5 Vict. No. 17, s. 94; 7 Vict. No. 19, s. 17; and 28 Vict. No. 273 s. 102; *vide In re Bowie*, 3 W.W. & a'B. (1.), 17, and *In re Bates*, 2 A.J.R., 48.

**CHAP. VIII.** insolvent on his application if it be satisfied that the failure to comply with such conditions has arisen from circumstances for which the insolvent cannot justly be held responsible (a).

Application for modification of order.

Where the insolvent applies to the Court to modify the terms of the order for a certificate of discharge on the ground that there is no reasonable probability of his being in the position to comply with the terms of such order, he must give fourteen days' notice of the day fixed for hearing the application to the official accountant and the trustee and to all his creditors (b).

Trustee may be examined.

On a voluntary or compulsory application for a certificate of discharge or on any compulsory appearance by an insolvent before the Court under the provisions of s. 149, Act of 1890, the Court may examine or permit any creditor or the insolvent to examine the trustee on oath as to the insolvent's conduct and affairs (c).

Preferential claims to be paid or satisfied or consent to be given.

The insolvent is not entitled unless the Court otherwise directs to an absolute grant of a certificate of discharge until all persons mentioned in s. 115 (2), Act of 1890, having claims against his estate have either consented to such grant or have been paid and satisfied such portion of the amounts owing to them as is by the said sub-section made a preferential claim against the estate (d).

Hearing when examination pending.

The application may be heard, notwithstanding that the examination of the insolvent or witnesses is pending (e). Causes may exist for seeking a postponement of the application as where examinations have not been held to ground opposition to the certificate owing to the omission of the insolvent to file his schedule or to inform the trustee of his place of residence or business, and apparently a judge has a discretion to postpone the hearing of the application for this purpose (f). The Court may adjourn the hearing of an application for a certificate as it may think fit (g).

Adjournment.

Refusal in unopposed matters.

The fact that there is no opposition to the grant of a certificate does not interfere with the discretion of the Court in refusing or suspending it (h).

(a) S. 95, Act of 1897.

(b) R. 314.

(c) S. 91 (1), Act of 1897.

(d) S. 93, Act of 1897.

(e) *In re Were*, 6 V.L.R. (I.), 43.

(f) *In re Millikin*, 4 V.L.R. (I.), 71.

(g) S. 91 (3), Act of 1897.

(h) *In re Marshall*, 6 W.W. & A.B. (I.), 4.



If it appears to the Court that a settlement, covenant or contract contemplated by s 103, Act of 1897 (*i*), was made in order to defeat or delay creditors, or was unjustifiable having regard to the state of the settlor's affairs at the time when it was made, the Court may refuse or suspend the certificate or grant an order subject to conditions in like manner as where a debtor has been guilty of fraud (*k*).

## CHAP. VIII.

Refusal and suspension in reference to fraudulent settlements.

If the insolvent has been convicted of any felony or misdemeanour under the Acts his certificate is refused, or if the insolvent has not been tried, but the Court is of opinion that the insolvent has been guilty of a felony or misdemeanour under the Acts, the certificate is refused, and the Court may in addition sentence such insolvent to imprisonment with or without hard labour for any period not exceeding one year (*l*). All the offences under the Acts are apparently misdemeanours, with the exception of the offence of absconding or attempting to abscond with property to the amount of twenty pounds or upwards, referred to in s. 159, Act of 1890, which is a felony, and also the offences under s. 141, which are acts of an insolvent, excepted from the class both of felonies and misdemeanours, but which are visited with punishment on the ground of their being acts for which it is held that a person who commits them, and who afterwards becomes insolvent, is properly liable to punishment (*m*).

Refusal in case of conviction of any felony or misdemeanour under the Acts.

If the insolvent has been guilty of any of the offences herein after set out (I. to XIII.), the Court can refuse or suspend the certificate for a period not exceeding two years, and may also, if it see fit, sentence the insolvent to imprisonment for any period not exceeding six months (*n*). The Court, in addition to punishing the insolvent by imprisonment and refusal of certificate under this section has jurisdiction to commit the insolvent for trial under s 8, Act of 1897 for the offences referred to therein. The exercise of the power of the one does not extinguish the power to exercise the other (*o*). The offences must be ascertained by just as rigid definition and proof, and by evidence as rigidly and cautiously admitted and dealt with as any other criminal offence (*p*).

Refusal or suspension for certain offences. Offences under s. 141, and punishment.

(i) See p. 231 hereof.

(k) S. 103, Act of 1897.

(l) S. 140, Act of 1890; s. 1, Act of 1897; *sed vide* s. 92, Act of 1897, which contains the words "unless for special reasons the Court otherwise determines."

(m) *Vide in re Vagg*, 14 V.L.R., at

p. 909.

(n) S. 141, Act of 1890—compare 23 Vict. No. 273, ss. 103, 104; and 7 Vict. No. 19, ss. 18, 19. *Vide* also s. 92, Act of 1897.

(o) *In re Sampson*, 20 V.L.R., 105.

(p) *Re Cabena*, 2 A.L.R., p. 87.

## CHAP. VIII.

Failure to keep  
reasonable  
accounts and  
entries.

I.—*If the insolvent has not kept reasonable accounts or entries of his receipts and payments (q).* Accounts are regarded as an important check on fraud, and the offence it has been held should be severely punished (r), and the absence of books showing the trade dealings of the insolvent is regarded as evidence of fraud (s). As to the punishment the offence should be gauged according to its being a probable concealment of fraud, and where the insolvent had not made entries of two amounts received on the winding up of his business, but there was no evidence of an intention to conceal, the certificate was suspended only and not refused (t). The gravity of the offence and the punishment therefor must be determined by the circumstances of each case. The fact that the insolvent's creditors were not injuriously affected by not keeping accounts does not make it any the less an offence, but it should be regarded in mitigation of punishment (u); but where the accounts were not reasonable and the omission was not due to ignorance or carelessness the certificate was refused (v). The books required to be kept are those ordinarily kept by persons of the insolvent's trade or business and a trader is therefore not bound to keep such books as are not so ordinarily kept (w). Having a bank account alone is not sufficient compliance as it is not a complete account of receipts and payments (x), and for the proprietor of a line of omnibuses, bank pass-books, cheque-books, receipts and vouchers only are not sufficient (y). The insolvent may have proper books, but if he hands them over to trustees under a deed of assignment or purchasers from them so as to hinder or hamper his creditors requiring them in insolvency inquiries, or if he burns his books and does not preserve them as long as they are required or are material to his estate (z) he commits an offence within this sub-section (a).

Cases as to  
partners in this  
sub-section.

The liability of a partner for the acts of another in connection with the keeping of accounts and entries of receipts and payments

- (q) S. 141 (I.), Act of 1890.
- (r) *In re Dwyer*, 6 V.L.R. (I.), 29.
- (s) *In re Bell*, 1 A.J.R., 38, 55; 1 V.R. (I.), 2.
- (t) *In re Schlieff*, 6 V.L.R. (I.), 51; vide *In re Monaghan*, 10 V.L.R. (I.), 9.
- (u) *In re McNally*, 12 V.L.R., 254.
- (v) *In re McDonald*, 6 V.L.R. (I.), 45.

- (w) *In re Kershaw*, 1 V.L.R. (I.), 44.
- (x) *In re Monaghan*, 10 V.L.R. (I.), 9.
- (y) *In re Arnold*, 5 V.L.R. (I.), 39. As to other decisions, vide *In re Smith*, 1 A.J.R., 105, and *Re Schultzeff*, 4 W.W. & A.B. (I.), 1.
- (z) *In re Farrell*, 4 A.J.R., 101.
- (a) *In re Michael*, 5 A.J.R., 64.

is a question upon which the Full Court (b) declined to give an opinion, but the Court added that it was a matter that should be dealt with on the facts of each case, and that it may well be as a general rule that a member of a partnership firm is liable for the acts and defaults of his co-partners, and yet that in any particular case if it should be proved to the satisfaction of the Court that one partner was not the member of the firm who kept the books, but was engaged in a totally different branch of the business, he should be relieved from liability for the acts of his partners. Where one of two partners without the knowledge of the other made false returns to a banking company of which they were agents, though it was held that the last-named partner should have seen to the accuracy of the returns and had been guilty of negligence, it was not a case for the refusal of his certificate (c).

II.—*If there shall be an unsatisfied judgment against the insolvent in any action for assault, breach of promise or seduction, or for any malicious injury, or for damages in any divorce suit (d).* It has lately been enacted that an order of discharge will not release the insolvent from any liability under a judgment against him in an action for seduction, or under an affiliation or maintenance order, or under an order or a judgment against him as a respondent or co-respondent in a matrimonial cause, except to such an extent and under such conditions as the Court expressly orders in respect to such liability (e).

Unsatisfied judgment for assault, breach of promise, seduction, malicious injury, or damages in divorce.

III.—*If the insolvent shall have put any creditor to any vexatious or unjustifiable expense by any frivolous or inequitable defence or claim in any action, suit or other proceeding (f).* It will be observed that the sub-section is not limited as in some of the former Acts as to the recovery of money demands by creditors (g). In dealing with the objection in reference to an alleged frivolous defence to an order *nisi* for sequestration it was queried as to whether such would come under the Act (h). It has been held that a debtor's summons is a proceeding within the meaning

Frivolous defences and claims against creditors.

(b) *In re McIntyre*, 11 V.L.R., at p. 318.

(c) *Ex parte and re Dance*, 29 L.J. Bk., 16.

(d) S. 141 (II.), Act of 1890.

(e) S. 96, Act of 1897—compare 53 and 54 Vict., c. 71, s. 10.

(f) S. 141 (III.), Act of 1890.

(g) *Vide Re McNally*, 12 V.L.R., at p. 257 (note).

(h) *In re Kershaw*, 1 V.L.R. (I.), at p. 49. In this case there was no evidence that the allegation was true.

CHAP. VIII. of the sub-section and subject to its provisions, and where the debtor, admittedly indebted to the creditor to a large extent, took various technical objections to the summons, which were overruled, and some of the objections were repeated by the debtor in opposing the sequestration of his estate, it was held that the insolvent had been guilty of raising a frivolous defence thereto, putting the petitioning creditor to vexatious expense (*i*). It was held (*k*) that the debtor commits the offence, if having no honest object to attain, he puts in sham or useless pleas solely to harass the creditor. Where just exception, however, may be taken to the proceedings of the creditor it is otherwise; in such a case a pleading which gives the debtor time is not within the sub-section although there might be no substantial defence at law (*l*), and it has also been said that good grounds of defence are not merely such grounds as would be available as a defence in a Court of Justice but grounds which to an honorable man would afford a moral justification for the defence (*m*). In a case where the plaintiff creditor failed to recover a large portion of his claim without any reason being given for that failure, it was held that such being the case the insolvent could not be found guilty of raising a frivolous or inequitable defence although the main defence was frivolous and vexatious (*n*). It was also stated that there may be cases in which the plaintiff's recovering part only of the demand would not clear the defendant from the imputation of being frivolous and vexatious in defending (*o*).

Wilfully  
delaying  
sequestration  
to benefit  
certain  
creditors.

IV.—*If the insolvent shall have wilfully delayed sequestrating his estate or avoided the sequestration thereof in order to benefit or assist one or more creditors to the disadvantage and loss of the rest* (*p*). The sub-section contemplates a designed and pre-concerted postponement of sequestration, and therefore proof of mere procrastination or shrinking from the ordeal of the Court is not sufficient nor is that of a foolish and ill-advised persistency in avoiding sequestration (*q*).

(*i*) *In re Lyon*, 4 A.J.R., 108.

(*k*) *Re Mathieson*, 3 A.J.R., 92.

(*l*) *Ibid*, and *vide Ex parte Johnson*, 4 De G. & Sm., 25.

(*m*) *In re McGrath*, 1 A.L.T., 132; *In re Mathieson*, 3 A.J.R., 92.

(*n*) *In re Wright & Higgins*, 7 V.L.R. (I.), 7; 2 A.L.T., 144.

(*o*) *Ibid*, at p. 10. One of the reported cases which affords a good instance of a frivolous or inequitable defence is *In re McGrath*, 1 A.L.T., 132.

(*p*) S. 141 (iv.), Act of 1890.

(*q*) *In re Mathieson*, 3 A.J.R., 92.

## CHAP. VIII.

Gambling  
extravagance or  
vice.

V.—*If the insolvent shall have by habits of gambling, extravagance or vice, diminished his means of payment so as to lead to his becoming insolvent (r).* The offence arises when the gambling, extravagance or vice has diminished the debtor's means of payment to such an extent that it leads to his becoming insolvent, and therefore the material ingredient of proof is that the insolvent was a loser (s), and that therefore he has deprived himself of the means of paying his debts. A man may be a deep gambler, but not necessarily a loser (t). It is wrong to assume that a man is a gambler because he buys shares in a prospering company without having the means of paying up all calls that ever could be made upon such shares, and the test whether a man has been gambling or rashly speculating does not depend upon his ability to pay the calls subsequently made, but upon his conduct and position when he bought (u).

An objection taken under this sub-section to the effect that the insolvent had diminished his means of payment by habits of gambling in speculating largely in mining shares, was not sustained, on the ground that dealing in mining shares was not gambling (v).

VI.—*If the insolvent has not complied with the lawful directions and demands of the assignee or trustee of his estate (x).* By s. 128, Act of 1890, the insolvent must amongst his other duties wait at such times on the trustee, and generally do all such acts and things in relation to his property, and the distribution of the proceeds amongst his creditors as may be reasonably required by the trustee, and for a wilful failure to perform such duties he may in addition to any other punishment be punished for contempt of Court.

Non-compliance  
with lawful  
directions of  
assignee or  
trustee.

VII.—*If the insolvent being a trader has carried on trade by means of fictitious capital (y).* This sub-section is restricted to traders, and a person carrying on business as an accountant, broker and commission agent is not one within it (z). "Fictitious" does not mean feigned or falsely described, but unreal—that which

Carrying on  
trade by means  
of fictitious  
capital.

(r) S. 141 (v.), Act of 1890.

(s) *Vide In re Davies (J.R.)*, 1 W. & W. (I.), at p. 6.(t) *Ibid.*(u) *In re Davies (J.B.)*, 17 A.L.T., 2; 2 A.L.R., 39.(v) *In re Schuhkraft*, 4 W.W. & a'B.(I.), 1. As to gambling on the Stock Exchange for differences *vide In re and ex parte Jenkins*, 8 Morrell, 36.

(x) S. 141 (vi.), Act of 1890.

(y) S. 141 (vii.), *ante*.(z) *In re Aarons*, 6 V.L.R. (I.), 56.

CHAP. VIII. seems and is not (a). Trading with fictitious capital is a matter somewhat hard to define, but it must mean that the insolvent has made some false statement or acted in some way so as to produce a false opinion about his capital (b). Trading on accommodation acceptances would be within the sub-section (c), and where the insolvents embarked in an extensive speculation, having entered into a large railway contract with the Government of Victoria without capital, relying upon funds to be supplied by a bank which received all payments made by the Government and placed them out of the control of the insolvents, it was held to be a case of trading on fictitious capital (d). The position was fictitious because to the world the insolvents would seem persons of means disposable at their discretion, but to those to whom they became liable in business they had none (e). A clear case is if the insolvent begins business without capital, and in debt, and is never solvent from commencement to close, and in the meantime is kept afloat by transactions which while they furnish supplies from day to day, leave him always in debt and having no real capital to meet his liabilities, borrows money continually to avert difficulties as they thicken, and uses his wife's money to eke out the paucity of his own (f). On the other hand an objection alleging that the insolvent knowing the very uncertain state of his affairs continued to order large consignments and raise money on bills of lading, and thus with inadequate capital traded on speculative consignment of goods purchased on credit and with the advances made thereon from time to time paid for previous purchases made in a similar manner, was unsustained as a charge of trading with fictitious capital. The judge failed to see what the fiction was, but believing the objection to be true thought it perhaps to be a ground for some charge against the insolvent (g). Considering bad debts as good ones cannot be regarded as carrying on trade by means of fictitious capital within the meaning of the sub-section (h).

Failure to make  
a full and fair  
disclosure of  
property.

VIII.—*If the insolvent has not, so far as he was examined thereupon, made a full and fair disclosure of his property in*

- (a) *In re McDonald*, 1 A.L.T., 185.
- (b) *In re Monaghan*, 10 V.L.R. (I.), at p. 16; 6 A.L.T., 1.
- (c) *In re Bryant*, 4 W.W. & s'B. (I.), at p. 11.
- (d) *In re Wright & Higgins*, 7

V.L.R. (I.), 7; 2 A.L.T., 144.

(e) *Ibid.*

(f) *In re McDonald*, 1 A.L.T., 185.

(g) *In re Oppenheimer*, 6 V.L.R. (I.), 28.

(h) *In re Martin*, 2 A.L.T., 48.

*possession, reversion, or expectancy (i).* An insolvent failed to inform his trustees of an asset omitted from his schedule, as the Court thought by an oversight, and it was consequently held that such did not authorise the refusal or suspension of his certificate on the ground that he had not made a full and fair disclosure of his property (*k*). Inquiries should be made and the failure then to make a full and fair disclosure would bring the insolvent within the sub-section (*l*), as for instance where the insolvent refused to surrender certain goods which the messenger of the Court sought to seize and also falsely represented them as the property of another person (*m*).

IX.—*If the insolvent shall have wilfully violated or omitted to comply with any of the provisions of the Acts (n).* If an insolvent pay a creditor his debt or a portion of it after sequestration, s. 75, Act of 1890, avoids such as between the creditor and others, but such section does not forbid such a payment so as to make the insolvent violate any provision of the Acts and thus bring him within this provision (*o*).

Violation of or omission to comply with provisions of the Acts.

X.—*If the insolvent shall have contracted any debt or debts to any of his creditors without in fact intending to pay or having at the time he contracted such debt or debts any reasonable or probable expectation of being able to pay the same (p).* To show a general inability on the part of the insolvent to pay all his debts is insufficient (*q*). In other words an inability to meet all debts is not a ground for refusing a certificate if there are probable means of paying the particular debt (*r*).

Contracting debts without intending to pay or having reasonable expectation of paying same.

In drawing money from a bank a debt it appears may be created which the insolvent can be regarded as having had no reasonable or probable expectation of paying (*s*); but the fact, however, that a person in insolvent circumstances overdraws an account current does not in itself amount to contracting a debt

(i) S. 141 (VIII.), Act of 1890.

(k) *In re Aarons*, 6 V.L.R. (I.), 56.

(l) *Vide In re Dunphy*, 3 A.L.T., 28.

(m) *Vide In re Pogonowski*, 1 W.W. & A.B. (I.), 29, decided under 7 Vict. c. 19.

(n) S. 141 (IX.), Act of 1890; s. 1, Act of 1897.

(o) *Vide In re Kershaw*, 1 V.L.R. (I.), at p. 49.

(p) S. 141 (x.), Act of 1890.

(q) *Vide In re Walters*, 3 W.W. & A.B. (I.), 14; *In re Mason*, *ibid*, 28; *In re Goldsmith*, 5 V.L.R. (I.), 18; *In re Hill*, 1 A.J.R., 172.

(r) *In re Arnold*, 5 V.L.R. (I.), at p. 45; *In re Aarons*, 6 V.L.R. (I.), at p. 60.

(s) *Vide In re Handasyde*, 1 W. & W. (I.), 113.

CHAP. VIII. without reasonable or probable expectation of being able to pay the same (t).

In a case where the insolvent renewed a debt by giving his bills to a creditor in order to buy off opposition to his certificate application and became insolvent again, the creditor opposed his certificate in the second insolvency on this sub-section amongst other objections. In so renewing the debt the insolvent indicated to the creditor that he had no means of his own to pay the same, and the objection failed, as it could not be inferred that he never intended to pay it (u); and the objection also failed where the balance of debt was reincurred by the acceptance of a bill subsequent to a release under an assignment for the benefit of creditors, the bill being accepted on the express agreement for an indefinite renewal (v).

Accommodation bill transactions are not regarded with favour, and such must be expected to be subjected to rigid investigation (w). The objection was successful where the insolvent had accepted accommodation bills, and whose means, though adequate to meet his proper liabilities, were totally inadequate to meet such bills (x). The acceptance of such bills is a contracting of debts, the debt arising as soon as the bill is discounted (y).

Where an insolvent had been ordered to pay damages and costs as a co-respondent in a divorce case, such was held not to be a debt contracted within the meaning of the analogous section of the English Act of 1861, s. 159 (z).

Unjustifiably  
making away  
or disposing  
of property.

XI.—*If the insolvent, being at the time indebted to any of his creditors, shall have unjustifiably made away with, or disposed of otherwise than bona fide and for a valuable consideration, any of his property (a).* The cases to which this sub-section is often applied are those in the nature of settlements or assignments of property, which should rightly belong to the creditors, as for instance a settlement executed in anticipation of the

(t) *Ex parte Harrison, in re Baillie*, L.R., 2 Ch., 195.

(u) *In re Cunningham*, 2 V.L.R. (I.), 9. In this case it was doubted whether a debt so revived could be deemed to be contracted within the Act.

(v) *In re Mathieson*, 3 A.J.R., 92.

(w) *Ex parte Hammond*, 6 De G. M. & G., 699.

(x) *In re Bryant*, 4 W.W. & a'B. (L.), 7. See also *Ex parte and re Barker*, 33 L.J. Bk., 13, and *Ex parte and re Mee*, L.R., 1; Ch., 337.

(y) *In re Bryant, ante.*

(z) *Ex parte and re Clayton*, 5 L.R. Ch., 13.

(a) S. 141 (xI.), Act of 1890.



possible result of litigation or after the result is known (b), or a voluntary settlement of all the insolvent's property on his wife with the design of evading the payment of damages in an action (c). Where the assignment of such property was made to a company, and the insolvent denied that such company had any existence, the assertion was held strong evidence in support of the objection, as it showed that he had gone through the form with the apparent dishonest purpose of assigning property which belonged to his creditors (d). The insolvent, however, is estopped from denying in such a case that the company had no corporate existence (e). Where a settlement of property of great value was made by the insolvent on his wife, it being probable at the time that he contemplated insolvency from the extent of his liabilities, the Court found the transaction so far dishonest as to come within the meaning of the word "unjustifiably," which latter word, it was held, should be regarded as not only "illegally," but "dishonestly" (f).

The "unjustifiably" making away is a matter of proof, and there is nothing in the mere fact that a settlement has been made at a time a debt is owed to a creditor to show that he so made away with the property (g). In a later case the unjustifiable disposal of the property took the form of a sub-lease of a property of which the insolvent was lessee, and which formed his only available means of support. The sub-lease was made to a relative, who in the opinion of the Court was merely a trustee for the insolvent (h). For the purpose of withholding a certificate, assignments between relatives it has been held on the eve of the insolvency of the assignor not publicly visible, and the details of which are very improbable, should generally be held fraudulent, although sworn by the parties to have been honestly effected, in such a way that no decided falsehood can be detected in their testimony (i).

Buying goods and immediately pledging them to raise money is covered by the sub-section (k).

(b) *Vide Goodman v. Hughes*, 1 W. & W. (E.), 202; *In re Solomon*, 1 W.W. & a'B. (I.), 45.

(c) *In re Curley*, 2 W.W. & a'B. (I.), 1.

(d) *Vide re Hall*, 14 V.L.R., 633.

(e) *Ibid.*

(f) *In re Rogers*, N.C., 41; Purves

and McKinley's Digest, p. 19.

(g) *In re Mahony*, 1 W. & W. (I.), 188.

(h) *In re Aarons*, 6 V.L.R. (I.), 56.

(i) *Vide In re Allen*, 2 W.W. & a'B. (I.), at p. 7.

(k) *In re Handasyde*, 1 W. & W. (I.), 110.

## CHAP. VIII.

Unlawfully  
expending or  
appropriating  
trust money.

XII.—*If the insolvent shall have unlawfully expended for his own benefit or appropriated to his own use any property of which he shall at the time have had the charge or disposition as a trustee or agent factor or broker only, and not in any other capacity (l).* The offence under this sub-section is limited to property of which the insolvent has at the time the charge or disposition as a trustee or agent factor or broker *only*, and not in any other capacity, and therefore it is necessary to prove that the insolvent appropriated property in which he had not acquired an interest himself (m). The words mean a broker or agent factor or trustee without any interest, and the word “only” was advisedly inserted to exclude cases in which the character of agent existed along with some other character involving an interest (n). The sub-section, therefore, will not apply where the insolvent was warranted by the previous transactions between the creditor and himself in regarding the property in his possession as involving a question of indebtedness only, and the best test of the appropriation to the insolvent’s own use of moneys is to inquire, was it his duty to keep the money so ear-marked that in the event of the creditor’s death it could be said it was his money; or was the insolvent warranted by all the previous transactions between the creditor and himself in receiving the money and treating himself merely as a debtor for the amount (o). An insolvent was held merely a debtor and the sub-section inapplicable where he as a broker effected insurances for the Government in various companies, and the policies were issued in exchange for his I.O.U.’s. for the amount of the premiums which were subsequently received by the insolvent from the Government and paid to the companies by him, and he became insolvent after having received certain premiums which he had failed to pay over (p). The objection is sustainable against an auctioneer entrusted with property for sale who pays the proceeds into his general banking account and fails to pay (q) and also against an insolvent who receives money to be invested at interest on good and approved securities, but instead the money is lent out on bills drawn by and payable to himself personally and

(l) S. 141 (XII.), Act of 1890.

(m) *Vide Re Vagg*, 14 V.L.R., 910.

(n) *Vide In re Perry*, 1 W. & W. (L.), 150.

(o) *In re Nantes*, 1 W. & W. (L.), 1.

(p) *In re Aarons*, 6 V.L.R. (L.), 56.

(q) *In re Perry*, 1 W. & W. (L.), 150.

is treated and appears in his schedule as his own, and his books contain nothing to indicate the true state of the case, that the insolvent had no interest in the money except a bare remuneration for his services in the way of commission (*r*). In considering this objection to a certificate the fact that the creditor had sustained, owing to the smallness of the amount, but little injury does not afford the insolvent any relief, as misappropriation has no degrees, neither can a subsequent arrangement made between the creditor and insolvent that the money in question should be considered as a loan, especially after sequestration, do away with the offence (*s*). Fraudulent intent is not an ingredient of the offence (*t*). Where the insolvent's firm who were agents for a bank failed to pay over an amount owing to a mistake on the part of their book-keeper and there was no evidence of dishonesty such did not amount to an offence within this sub-section, as "unlawfully" in such means "dishonestly," but it was culpably negligent conduct under s. 142 (*u*).

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The word "property" in this sub-section is not equivalent to the word "property" as defined in the interpretation clause. In this sub-section it means the goods or money themselves and not a right or interest in property or an obligation arising therefrom as included in the definition (*v*).

Meaning of property in sub-section.

XIII.—*If the insolvent shall have given any creditor a fraudulent preference* (*w*). This sub-section, since the enactment of the *Insolvency Statute* 1871, has been limited to a fraudulent preference. In the Act prior to that, 28 Vict. c. 273, s. 103, the offence was "where he shall, in contemplation of insolvency, or knowing "himself to be insolvent, have given any creditor any fraudulent "or unjust preference." And under that Act "a fraudulent and "unjust preference" was with doubt regarded not necessarily to be a fraudulent preference contemplated by the other provisions of the Act (*x*), and was such a preference as would not merely avoid the payment but had some fraud in connection with it (*y*).

Giving a creditor a fraudulent preference.

(*r*) *In re Christophers*, 1 W. & W. (L.), 108.

(*s*) *In re Scott*, 4 A.J.R., 50, 65; and *vide Ex parte Selby*, 25 L.J., Bky., 13.

(*t*) *Ibid.*

(*u*) *In re Martin*, 2 A.L.T., 48; *vide post*, at p. 398.

(*v*) *Vide In re Vagg*, 14 V.L.R., 902.

(*w*) S. 141 (XIII.), Act of 1890.

(*x*) *Vide In re White*, 6 W. & W. & a'B. (L.), 7.

(*y*) *In re Green*, 1 A.J.R., 104.

CHAP. VIII. By s. 73, Act of 1890, a fraudulent preference is defined. The question of fraudulent preference is dealt with at p. 232, *ante*.

Suspension of certificate for fraudulent or culpably negligent conduct.

Object and nature of the provision.

Negligence of insolvent's employé.

Reckless trading.

By agent.

By partners.

If it appear to the Court upon a certificate application that though the insolvent has not been guilty of any of the offences mentioned in the 140th and 141st sections, the conduct of the insolvent before or after sequestration has been fraudulent or culpably negligent, the Court may suspend the certificate for any period not exceeding one year (*z*). The object of this provision is to deal with misconduct not distinctly specified in the Act. There are two distinct offences contemplated *i.e.*, conduct fraudulent and conduct culpably negligent, and they should be clearly and distinctly proved (*a*). The same act may be both (*b*), but distinct convictions should be expressed stating what the misconduct is, fraud or culpable negligence. The minor imputation of the two is the latter (*c*), and it means something beyond ordinary negligence or imprudence, such extravagant negligence as would approach to the nature of fraud by reason of its extravagance (*d*). Where an insolvent whose firm were agents for a bank to sell certain property had to account to the firm's principal for the proceeds and failed to pay over a large amount owing to a mistake on the part of their book-keeper, such was held to be culpably negligent conduct within the section (*e*). The fraudulent imitation of the brands of trade marks of another person (*f*) and reckless trading (*g*) are probably within the section. As to the fraudulent conduct of a person when acting as an agent, *vide in re Vagg* (*h*). So far as relates to "misconduct" the Court is unable to draw any sound distinction between partners (*i*). If the misconduct rests with one of the partners it is for the others to show their exemption (*k*).

#### 5.—FORM AND EFFECT OF CERTIFICATE.

Form of certificate.

The certificate is issued under the hand of the judge and the seal of the Court, but it is not drawn up nor does it take effect

(*z*) S. 142, Act of 1890.

(*a*) *Re Cabena*, 2 A.L.R., at p. 87;

17 A.L.T., 286.

(*b*) *In re Hearty*, 6 V.L.R. (I.), 37.

(*c*) *Ibid*.

(*d*) *Re Cabena*, 2 A.L.R., at p. 88;

17 A.L.T., 286.

(*e*) *In re Martin*, 2 A.L.T., 48.

(*f*) *Vide In re Brebner*, 2 W. & W. (I.), 12.

(*g*) *Vide In re Gardner*, 1 A.J.R.,

47.

(*h*) 14 V.L.R., 902.

(*i*) *In re Rutledge & Co.*, 2 W. & W. (I.), 89.

(*k*) *Ibid*, at p. 97.

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until after the expiration of the time allowed for appeal or if an appeal be brought after the decision of the Court of Appeal upon such appeal (*l*). On the application being granted for a certificate an order (*m*) to that effect is made by the Court before the issue of the certificate. The certificate must be in the prescribed form, for which see 71, Appendix, *post*. It must bear date either the day after the expiration of the time allowed for appeal or the day of the decision of the Court of Appeal as the case may require (*n*).

Order for certificate.

The certificate upon taking effect discharges the insolvent from all debts provable under his insolvency save as otherwise provided in the Insolvency Acts, and if thereafter any action be brought against him for any such debt, claim, or demand he may plead in general that the cause of action accrued before he became insolvent, and may give the Act and the special matter in evidence, and the certificate is sufficient evidence of the sequestration and the proceedings precedent thereto (*o*). The exceptions from the operation of the certificate treated by the Act of 1890 are those relating to assignees or trustees of insolvents' estates and to partners. As to the former, the assignee or trustee becoming insolvent and being indebted to the estate of which he was assignee or trustee in respect of any sum of money improperly retained or employed by him is not discharged by obtaining his certificate as to his future effects in respect of the said debt (*p*), and as to the latter the certificate does not release or discharge any person who was a partner with the insolvent at the time of the insolvency or was then jointly bound or had made any joint contract with him (*q*).

Effect of certificate.

Certificate evidence of sequestration.

Debts excepted from the operation of the certificate.

Debts due to insolvent by insolvent trustee or assignee.

Partners and joint creditors unreleased.

Unliquidated damages arising otherwise than by reason of a contract or promise are not provable in insolvency (*r*), and are not discharged by the certificate unless the action was commenced in respect thereof prior to sequestration, in which case s. 77 provides the mode of proof and consequently the discharge of the liability. Where the Court under the procedure of s. 114 thinks that the

Unliquidated damages arising otherwise than by reason of a promise in certain cases.

Contingent debts incapable of being fairly estimated.

(*l*) S. 145, Act of 1890.(*m*) Form 66, Appendix, *post*.(*n*) S. 145, Act of 1890.(*o*) S. 145—compare 5 Vict. No. 17, ss. 97 and 99; 28 Vict. No. 273, s. 107; 32 & 33 Vict. c. 71, s. 49; and 46 & 47 Vict. c. 52, s. 30.(*p*) S. 151—compare 5 Vict. No. 17, s. 98.(*q*) S. 146—compare 32 & 33 Vict. c. 71, s. 50. *Vide* also s. 97, Act of 1897—compare *Bankruptcy Act* 1883, s. 30 (4).(*r*) S. 114, Act of 1890.

CHAP. VIII. value of a contingent debt or liability is incapable of being fairly estimated, it may make an order to that effect, and upon such order being made such debt or liability for the purposes of the estate is deemed to be a debt not provable in insolvency and presumably therefore undischarged by the certificate (s).

Crown debts.

Debts due to the Crown are not discharged by the certificate, as the Crown is not bound by the Acts since it is not named therein (t). Neither is the obligation to pay alimony (u), nor is the liability of a parent to pay for the maintenance of a neglected child (v), nor that for the payment of an order for maintenance money of a wife or children (w).

Alimony.

Liability for maintenance of wife and children.

Debts incurred or forborne by fraud or fraudulent breach of trust.

By the Act of 1897 the certificate does not release an insolvent from any debt or liability incurred by means of any fraud or fraudulent breach of trust to which the insolvent was a party, or a debt or liability whereof he has obtained forbearance by a fraud to which he was a party (x). The costs of an action against a fraudulent trustee are not "a debt or liability incurred by "means of a fraudulent breach of trust" within the meaning of the section (z).

Liability under judgment for seduction affiliation and maintenance orders and matrimonial causes.

The Act of 1897 also provides (a), that the certificate will not release an insolvent from liability under a judgment against him in an action for seduction or under an affiliation or maintenance order or under an order or a judgment against him as a respondent or co-respondent in a matrimonial cause except to such extent and under such conditions as the Court expressly orders in respect of such liability.

#### 6.—APPEAL FROM CERTIFICATE DECISIONS.

An appeal lies either from the grant or refusal of a certificate application (b).

Judge's reasons on appeal.

On the ground that appeals in respect to certificates are nearly all one-sided it is of the utmost importance that s. 11, Act of 1890,

(s) S. 114; and *vide Breslauer v. Brown*, 3 App. Cas., at p. 699.

(t) *Reg. v. Griffiths*, 9 V.L.R. (L.), 45.

(u) *In re and ex parte Hawkins*, (1894) 1 Q.B., 25; 1 Manson, 6; *Linton v. Linton*, 15 Q.B.D., 239.

(v) *Neglected Children's Act* 1890, s. 53.

(w) *Vide re Harris*, 6 V.L.R. (L.),

47.

(x) Act of 1897, s. 96—compare *Bankruptcy Act* 1883, s. 30.

(z) *In re Greer, Napper v. Fanshawe*, (1895) 2 Ch., 217; 2 Manson, 350.

(a) S. 96 (d)—compare *Bankruptcy Act* 1890, s. 10.

(b) S. 11, Act of 1890; *Re Dyte*, 2 V.L.R. (I.), 42; *Re McIntyre*, 11

which requires that the judge who makes the order to forward to the Supreme Court a copy of his notes of the evidence taken before him together with a statement of his reasons for making such order, should be complied with (c). Fragmentary remarks are not sufficient (d).

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The rule apart from exceptional cases in appeals of this kind by insolvents is not to discourage trustees and creditors from appearing in the Supreme Court to support the decisions of the Court below by awarding costs against them, and the general rule therefore in allowing an insolvent's appeal is to do so without costs (e).

Rule as to costs in such appeal by insolvents.

#### 7.—CERTIFICATES UNDER OLD LAW.

An insolvent whose certificate has been granted under the law in force previous to the passing of the *Insolvency Act* 1871, but whose certificate has not been confirmed at the next sitting of the Supreme Court after the grant thereof, has liberty to apply to the Supreme Court for an order confirming such grant, and such confirmation has the same force and effect as if the same had been made at the next sitting referred to of such Court (f). The next sitting of the Court is reckoned from the oral grant and not the next sitting after the signature to the certificate (g). The provision does not apply to certificates under the old law granted since the passing of the *Insolvency Statute* 1871 (h).

Certificates granted under old law but not confirmed.

Any person whose certificate has been granted previous to such time aforesaid by the chief or other commissioner of insolvent estates, but who upon appeal to the Supreme Court has had such certificate refused, may apply to the Court at Melbourne upon giving such notice as the rules may direct, and the Court may, having regard to the grounds of the refusal of the certificate and the period which has elapsed since such refusal, grant or further suspend any such certificate for such period and upon such terms (if any) as the Court may deem just. Every certificate granted under this provision must be in the same form and has the same

Certificates granted under old law but refused by Supreme Court on appeal.

V.L.R. (I.), at p. 319. As to appeals generally, *vide* p. 19, *et seq.*, *ante*.

(c) *In re Davies*, 17 A.L.T., 261; 2 A.L.R., 37.

(d) *Ibid*.

(e) *In re McIntyre*, 11 V.L.R. (I.),

at p. 320; and *Re Cabena*, 2 A.L.R., 88.

(f) S. 152, Act of 1890; and *vide* s. 105, 28 Vict., No. 273.

(g) *In re Ryan*, 13 V.L.R., 597.

(h) *In re Bowman*, 3 V.L.R. (I.), 104.

**CHAP. VIII.** effect as any certificate granted under the law in force in Victoria at the time any such certificate was refused (*i*).

Application to  
Melbourne  
Court where  
certificate has  
been refused  
under old law.

Any person whose certificate has been refused under the law relating to insolvency in force in Victoria before the passing of the *Insolvency Statute* 1871, but who, not having appealed to the Supreme Court against such refusal, cannot avail himself of the rider to the Act 10 Vict. No. 14, or of the provisions of 28 Vict. No. 273, s. 109, may apply to the Court at Melbourne, subject to giving such notice as the rules may direct, for an order granting him a certificate, and the Court may, having regard to the ground of the refusal of the certificate and the period which has elapsed since such refusal, grant or further suspend any such certificate for such period and upon such terms (if any) as it may deem just (*k*). Every certificate granted under the provisions of this provision is in the same form and has the same effect as any certificate granted under the law in force in Victoria at the time any such certificate was refused (*l*).

Procedure.

Any person intending to make application to the Court under s. 152 of the Act of 1890 must cause notice in writing to be served on the official assignee and the creditor (if any) who opposed the grant of the certificate before the commissioner or Supreme Court (as the case may be) twenty days at least before the time fixed for the hearing of such application. If the creditor who opposed is dead or has left Victoria it is sufficient to serve the official assignee. The Court may, on cause shown, on special application direct advertisements to be inserted in lieu of service of notice. Every person applying under such section must file with the chief clerk at Melbourne an affidavit setting out the date of the sequestration, and that two years have elapsed since the refusal of the certificate by the Supreme Court or commissioner (as the case may be), and what dividend (if any) has been paid in his estate, and the grounds of the refusal of his certificate, and how he has been employed in the meantime, and what have been his means (if any) of paying his creditors. The chief clerk of the Geelong or Beechworth districts respectively must upon any application being made to the Court at Melbourne under such section regarding an estate situate in those districts, upon

(*i*) S. 152, Act of 1890.

(*k*) *Ibid.*

(*l*) *Ibid.*



receiving a request in writing so to do together with the fee of CHAP. VIII. one pound, forward to the chief clerk at Melbourne the papers in such estate, and after the application has been disposed of the chief clerk at Melbourne must return such papers. Any creditor or the official or elected assignee may appear and be heard on any application under such section (*m*).

On such applications for a confirmation of the certificate notice should be served upon the continuing partners and members of the present firms as being members of the old creditors' firms. If there is any special difficulty in serving the creditors it may be dispensed with (*n*). Notice has not invariably been required and the rule has been relaxed by requiring notice to be served on a large creditor and not on all the creditors (*o*). The notices may be served by post where there is any special difficulty in effecting personal service (*p*).

## II.—RELEASE OF INSOLVENT ESTATE.

### 1.—RELEASES UNDER SS. 131 AND 132, ACT OF 1890.

The insolvent may apply to the Court for an order releasing his estate from sequestration if at any time after sequestration Release under s. 131, Act of 1890. three-fourths in number and value of the creditors who have proved debts by writing under their hands (1) agree to accept an offer of composition, (2) or security for composition (*q*). The offer may be made by the insolvent or any person on his behalf (*r*). The Court upon being satisfied (1) that such offer has been actually accepted in the manner stated; (2) that the terms of such offer have been complied with by the insolvent; and (3) that acceptance of the same has not been procured by him or anyone on his behalf to his knowledge or belief by any fraudulent or undue means or influence or to the advantage of one creditor over another unless with the knowledge and consent in writing of the rest of the creditors may make such an order upon such terms as to costs, commission, or remuneration and charges already incurred as may be just (*s*). In addition to such

(*m*) R. 315.

(*n*) *In re Finlayson*, 6 V.L.R. (I.), 82, 83.

(*o*) *In re Guthrie*, 8 V.L.R. (I.), 4, 5.

(*p*) *In re Byrnes*, 10 V.L.R. (I.), 5.

(*q*) S. 131—compare 32 & 33 Vict. c. 71, s. 28; 5 Vict. No. 17, s. 86; 23 Vict. No. 273, s. 42.

(*r*) *Ibid.*

(*s*) *Ibid.*

**CHAP. VIII.** requirements the practice of the Court at Melbourne requires the affidavit of the insolvent and his solicitor to contain a separate paragraph to the effect that such acceptance has not been procured either by the payment of money or delivery of goods or by the promise to pay money or deliver goods or by giving any promissory note or bill of exchange or other security for the payment of money or delivery of goods or by the promise to give any such promissory note, bill of exchange, or other security by the insolvent or any other person, unless with the knowledge and consent in writing of the rest of the creditors (*t*); and, further, s. 14 (1), Act of 1897, provides that the Court must not make an order releasing the estate of an insolvent unless the offer of composition or security for composition appears to the Court to be reasonable or calculated to benefit the general body of creditors.

Effect of Act of 1897.

Number and value of creditors.

In the prior enactment as to the release of an estate (*u*) the words "greater part of the creditors in number and value" and "three-fourths in number and value" occur. It was held thereunder, and the decision is apparently applicable to the present section, that where there were no creditors who could be reckoned in number, a majority in value is sufficient (*v*). Under the Act 5 Vict. No. 17, where the procedure was different and a meeting of creditors was necessary to accept a composition, one person only attended as proxy for two creditors, and as representing one he proposed and as representing the other seconded the adoption of the composition. It was held that as Acts by which a majority is allowed to lead a minority must be construed strictly, the proxy could not be split into two different capacities so as to constitute a majority (*x*). The consent of the statutory number of creditors is unaffected by the fact that payments to preferential creditors have been made by the assignee (*y*). The agreement to accept the offer of composition or security for composition is restricted to creditors who have proved (*z*), and the petitioning creditor in a compulsory sequestration must prove his debt (*a*). A debt of a creditor, the proof of which is the subject of proceedings to expunge, reject or reduce, must be taken into consideration

\*Unaffected by preference payments.

Agreement confined to proved creditors.

(*t*) Notice issued by Court 24th March, 1893.

(*u*) 28 Vict. No. 273, s. 42.

(*v*) *In re Knoebel*, 1 V.R. (1.), 10.

(*x*) *In re Schlieff*, 3 V.L.R. (1.), 18.

(*y*) *In re Bailliere*, 2 A.L.T., 57.

(*z*) S. 131, Act of 1890.

(*a*) *Vide In re McTavish*, 2 W.W. & a'B. (1.), 26.

in determining whether there is a majority, and therefore when such proof is expunged on appeal, and the majority of creditors agreeing to the release is thereby made sufficient, the debtor has to make a fresh application to the Court for such release (b). CHAP. VIII.

The consenting majority must be a majority not of a certain class of creditors but of all who have proved. S. 26 of the Act of 1890 does not apply to the interpretation of s. 131, as the former deals only with votes for or against resolutions at meetings of creditors (c). The majority is that of all creditors who have proved.

All creditors who have proved are bound by the agreement and possibly creditors who have not proved. This point though commented on was not decided (d). What creditors are bound by the agreement.

An insolvent intending to apply for a release of his estate from sequestration must make his application to the Court in writing in the form No. 55 in the Appendix, *post*, with such variations as circumstances may require, and thereupon the Court appoints a day for hearing the application in open Court. Notice of any application under ss. 131 or 132 of the principal Act must be in the form No. 55A in the Appendix, *post*, and must be served upon the trustee and official accountant and upon every creditor of the insolvent whether such creditor has proved or not thirty days before the day appointed for hearing such application. If any creditor be dead service upon his personal representative is sufficient or if any creditor be absent from Victoria service upon his agent is sufficient, but the Court may dispense with service if there be no representative or agent in Victoria of such deceased or absent person (e). This means that the Court may in its discretion release the estate without notice to the absent creditor having been given if it is satisfied that the creditor has no agent in Victoria (f). The insolvent's oath that no such agent exists is sufficient, and it is sufficient to satisfy the Court at the hearing, and therefore a formal motion and order is unnecessary (g). Transfer and form of application.

Service, unless otherwise explained, means personal service (h). Form of notice.

(b) *In re Dallimore*, 5 A.J.R., 1.

(c) *In re Keogh*, 7 A.L.T., 79.

(d) *Vide Connell v. Carroll*, 10 V.L.R. (L.), at p. 175.

(e) R. 196. R. 105, of 1871, which dealt with this matter formerly, was held to be a valid and existing one, and

r. 196 is therefore not *ultra vires*. *In re Bruce*, 12 V.L.R., 709.

(f) *In re Bailliere*, 2 A.L.T., 57.

(g) *Ibid*.

(h) *Vide In re Charsley*, 16 A.L.T., 131; 20 V.L.R., 475.

Service on creditor in Victoria.

**CHAP. VIII.** Under the Act and Rules of 1890 when the creditor was in Victoria at the time a practice grew up of treating the posting of the notice to his last place of abode or business as equivalent to personal service (*i*). Assuming such practice to be legal, it must be proved that the conditions under which the posting is accepted as sufficient have been complied with (*k*).

The grant of the release.

The Court in dealing with the application insists upon a strict compliance with the requirements of the sections and the rules, and under the former Acts it was held, and it would appear to be equally applicable to the present, that unless the necessary requirements were complied with the Court had no jurisdiction to make the order (*l*). In fact it was thought prior to the Act of 1897 that if the requirements of the section and rules had been complied with the Court had no jurisdiction to refuse the insolvent the order (*m*). The section has been interpreted as conferring rights on the insolvent, and not on the creditors, as it was considered to afford a means of reinstating him in his honest industries, and if the evidence showed that the requirements of the section had been complied with, an order, it was held, ought to be granted (*n*). There are also some observations on this point in *Re Charsley* (*q*), in which it is thought that the Court, whether under s. 131 or 154, has to deal with the rights of both creditor and insolvent, and that it would be easier to contest the soundness of the English decisions than to treat them as applicable to the latter section but not to the former. The effect of s. 14 (1), Act of 1897 is, that the Court cannot make the order unless the offer of composition or security for composition appears to be *reasonable and calculated to benefit the general body of creditors* (*r*).-

Terms on which order is made.

The order is made upon such terms as to costs, commission or remuneration and charges already incurred as may be just (*s*). This includes the taxed costs of the petitioning creditor (*t*). An unconditional order would have the effect of depriving the

(i) *Vide In re Charsley, ante.*

(k) *Ibid.*

(l) *In re Stampe*, 1 W. & W. (L.), 10; *In re Barwick*, 2 W.W. & a'B. (L.), 35.

(m) *Re Marie*, 3 A.J.R., 63; *Re Bailliere*, 2 A.L.T., 57; *Re Risk*, 4 A.J.R., 25; *Re Blood*, 4 A.L.T., 184; and *In re Curtain*, 17 A.L.T., 108, in which *Re Charsley, ante*, is commented

on.

(n) *Re Levy*, Argus, 4th July, 1891.

(q) 20 V.L.R., at 477; 16 A.L.T., at 132.

(r) Compare s. 3 (2), *Bankruptcy Act* 1890.

(s) S. 131; r. 200.

(t) *In re Risk*, 4 A.J.R., 25.

petitioning creditor of the benefit the Act gives by s. 40 of CHAP. VIII. getting his costs out of the estate and of inflicting a penalty for having the law set in motion in the exercise of a right and probably for the advantage of the whole body of creditors (u).

R. 200 also provides that no order for the release can be made unless the Court is duly satisfied that provision is made for payment of all proper costs, charges and expenses of and incidental to the insolvency (v), and full costs were allowed opposing creditors where the debtor had opposed such creditors at every step and put them to unnecessary expense (w).

Provision for costs and charges.

If any facts are proved, on proof of which the Court would be required to refuse dispensation under s. 139 of the Act of 1890, the Court must refuse to make the order unless the offer provides reasonable security for payment of not less than seven shillings in the pound on all the unsecured debts provable against the insolvent's estate (x).

In certain cases seven shillings in the pound required.

In any other case the Court may either make or refuse to make an order releasing the insolvent's estate from sequestration (y), and the Court on any release application may, if it thinks fit, direct that the amount payable to any creditor who has not received the composition shall be secured in such manner as it directs (z).

Generally.

Any creditor who has proved his claim or the official accountant or trustee may, without notice to the insolvent, be heard upon any such application in opposition to or support thereof as the case may be (a).

Power to secure amount payable to creditor.

An order of the Court releasing the estate of any insolvent from sequestration is in the forms Nos. 56 or 57 in the Appendix, *post*, with such variations as circumstances may require (b).

Form of release order.

On the motion for the release it is the duty of the trustee to report to the Court in writing that he has investigated the matter and to state whether the requirements of the section have been complied with. Such report must be filed not less than four days before the time fixed for hearing the application (c).

Report of trustee.

- (u) *Ibid.*
- (v) R. 200.
- (w) *In re Marie, ante.*
- (x) R. 201.
- (y) R. 202.

- (z) R. 203.
- (a) R. 197.
- (b) R. 198.
- (c) R. 199.

## CHAP. VIII.

Creditor may  
appeal from  
order.

Under the English section a creditor may appeal against the order approving even if he has not proved his debt, as he is a person aggrieved (*d*).

Power of Court  
to sequester  
estate.

If at any time default is made in payment of any instalment due in pursuance of the composition, or if at any time it appears to the Court that the composition cannot proceed without injustice or undue delay, or if at any time it appears that the order for release was obtained by fraud, the Court may, if it thinks fit on application by any person interested, annul the composition and release and may sequester the debtor's estate; but without prejudice to the validity of any sale, disposition or payment duly made, or thing duly done under or in pursuance of the composition or release. Where the estate of a debtor is sequestered under this provision all debts provable in other respects which have been contracted before the date of such sequestration are provable in the insolvency (*e*). The annulment of a composition and release and the sequestration of a debtor's estate under this provision does not prejudice or affect the rights or remedies which any other person in good faith would have had in case such annulment had not been made, and any property which the insolvent may have acquired since the order for release was obtained, and which remains vested in him at the date of such annulment, vests in the trustee or in some other trustee when duly appointed and confirmed as in an ordinary case of insolvency subject to any *bond fide* encumbrances thereon, and is first applied by the trustee in satisfaction of debts incurred by the insolvent since the date of the order granting the release (*f*).

Saving of rights.

Grant of release  
restricted to  
insolvent.

The Act appears to regard the insolvent as a living person, and it was held under Act 28 Vict. No. 273 that the similar provisions therein contained were inapplicable after the death of an insolvent, and that consequently executors of a deceased insolvent could not on the acceptance of a composition obtain a release of the estate from sequestration (*g*).

Review of and  
setting aside  
order for release.

The Court has jurisdiction to review and set aside its order for the release if it is shown that the requirements of the Acts in that

(*d*) *In re Langtry, ex parte Stevenson*, 63 L.J.Q.B., 570; 1 Manson, 169.

(*e*) S. 14 (2), Act of 1897; *vide* cases on a similar clause in respect to composition with creditors, Chapter IX.,

*post*.

(*f*) S. 14 (3), *ibid*.

(*g*) *In re Scallan*, 2 V.L.R. (I.), at p. 8; *In re Rowan* (deceased), 3 A.L.R., 16.

respect have not been complied with by the insolvent as in the case of a creditor not being served with notice of the application (*h*). The fact that the order has not been appealed from within the time limited by the rules for appealing does not affect such jurisdiction (*i*).

If an insolvent or any person on his behalf pay in full all his creditors, or obtain a legal release of the debts due by the insolvent to such creditors, the insolvent may apply to the Court for an order releasing his estate from sequestration, and the Court may upon being satisfied that all the creditors of such insolvent have been paid in full or released their debts as aforesaid, make such order upon such terms as to costs, commission or remuneration and charges already incurred as may be just (*k*).

Release under s. 132, Act of 1890, on payment of debts in full.

## 2.—EFFECT OF RELEASE ORDER.

The effect of the order of release is that all creditors who have proved are bound, and the insolvent becomes a free man again (*l*). Whether creditors who have not proved are not similarly bound is queried (*m*), and the order has the effect of revesting in the insolvent all the property of the insolvent undisposed of which by virtue of the Act is vested in the assignee or trustee in the same manner as if the estate had never been sequestrated (*n*), and consequently when the estate has been revested, the insolvent has the same right to defeat a voluntary settlement made prior to insolvency as he would have had if no insolvency had occurred (*o*), but the section does not enable an insolvent after the order of release is made to proceed with an action commenced by him subsequent to sequestration. The action should be commenced after the order of release is made (*p*). S. 161 enacts that where a debtor makes any "composition with his creditors" under the Act (*q*), he remains liable for the unpaid balance of any debt which he incurred or increased, or whereof before the date of the composition, he obtained forbearance by any fraud unless the defrauded

Continued liability for debts incurred by fraud.

(*h*) *In re Bruce*, 12 V.L.R., 696.

(*i*) *Ibid.* As to amending and setting aside orders and reviewing decisions, *vide* pp. 10 and 11, *ante*.

(*k*) S. 132.

(*l*) *Connell v. Carroll*, 10 V.L.R. (L.), 169 and 178; *vide ante* at p. 406.

(*m*) *Ibid.*

(*n*) S. 133.

(*o*) *Moss v. Williamson*, 3 V.L.R. E., 221.

(*p*) *Vide Hodgson v. M'Caughan*, 3 V.L.R. (L.), 292.

(*q*) S. 131 uses the word composition.

CHAP. VIII. creditor has assented to the composition otherwise than by proving his debt and accepting dividends.

Action by  
alleged  
defrauded  
creditor.

The creditor who alleges that his debt has been contracted fraudulently by his debtor may commence an action against him for the balance of the debt after receiving a composition from him without being obliged to prove to the Court of Insolvency a *prima facie* case of fraud (r).

(r) *Ex parte Halford, re Jacobs*, 19 L.R. (E.), 436.



## CHAPTER IX.

### LIQUIDATION BY ARRANGEMENT AND COMPOSITION WITH CREDITORS.

- |  |  |
|--|--|
| 1. <i>General Remarks.</i>                                   | 3. <i>Proceedings restricted to Liquidation.</i> |
| 2. <i>Proceedings common to Liquidation and Composition.</i> | 4. <i>Proceedings restricted to Composition.</i> |

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#### 1.—GENERAL REMARKS.

LIQUIDATION by arrangement and composition with creditors are the two means under the provisions of the Acts in addition to insolvency and deeds of arrangement by which debtors unable to pay their debts in full can be discharged from their liabilities. The rights of a debtor and his creditors are wholly different in the cases of liquidation by arrangement and composition (*a*). In the former the effect of the resolution is to divest all the property of the debtor and vest it in the trustee, but in composition the property remains in the debtor (*b*). A debtor who has effected a composition has complete dominion over his property and full power to dispose of it until and unless the Court sequester the estate under s. 154, Act of 1890, and a purchaser from him is not bound to inquire as to the payments of instalments under the composition (*c*).

In liquidation by arrangement the debtor may summon a general meeting of his creditors, and such meeting by an extraordinary resolution can declare that the affairs of the debtor are to be liquidated by arrangement and not in insolvency, and the creditors may at that or some subsequent meeting, held at an

General meetings as to extraordinary resolution in liquidation by arrangement.

(a) *Ex parte Birmingham Gaslight and Coke Company, re Adams*, 40 L.J. Bkcy., 1; L.R. 11 Eq., 204.

(b) *Vide Malone v. —*, 7 Ir. R.

C.L., 473.

(c) *Re Kearley and Clayton's contract*, 7 C.D., 615.

CHAP. IX. interval of not more than a week, by an ordinary resolution appoint a trustee with or without a committee of inspection (*d*).

In composition. The creditors may at a general meeting to be held in the prescribed manner (*e*) without any proceedings in insolvency (*f*) resolve that a composition be accepted in satisfaction of the debts due to them from the debtor (*g*). The expression "debts due" covers all demands provable against the debtor's estate, and therefore it includes a liability to a company by a shareholder in respect of the uncalled amount upon his shares (*h*).

Meaning of extraordinary resolution in liquidation by arrangement.

An extraordinary resolution in liquidation by arrangement is a resolution agreed to by a majority in number and value of the creditors appearing on the statement (*i*).

In composition. In composition an extraordinary resolution is a resolution which has been passed by three-fourths in number and value of the creditors of the debtor appearing on the statement assembled or represented at a general meeting held in the prescribed manner, and of which notice has been given in the prescribed manner, and has been confirmed by a majority in number and value of the said creditors assembled or represented at a subsequent general meeting of which notice has been given in the prescribed manner, and held at an interval of not less than seven days nor more than fourteen days from the date of the meeting at which such resolution was first passed (*k*).

## 2.—PROCEEDINGS COMMON TO LIQUIDATION AND COMPOSITION.

Commencement. The proceedings are commenced by the debtor by petition and affidavit thereto annexed (*l*); forms 147 and 148, Appendix, *post*. The debtor should describe himself in the petition accurately as to his address and occupation (*m*). Such petition and affidavit must

Petition and forms of same and affidavit.

(*d*) S. 153, Act of 1890—compare 32 & 33 Vict. c. 71, s. 125.

(*e*) *Vide infra*.

(*f*) These words it has been stated mean that there may be a composition though there be no proceedings in insolvency, but they do not mean notwithstanding proceedings in insolvency. *In re Marie*, 3 A.J.R., 6. The question of passing resolutions under s. 154 after sequestration was referred to in this case, but not decided.

(*g*) S. 154, Act of 1890—compare 32 & 33 Vict. c. 71, s. 126.

(*h*) *In re Melbourne Loco., &c., Company Limited, Neave's case*, 21 V.L.R., 442; 17 A.L.T., 213; 2 A.L.R., 7.

(*i*) S. 153, *ante*.

(*k*) S. 154, *ante*.

(*l*) R. 379.

(*m*) *Vide Ex parte Jerningham*, 9 C.D., 466; *Ex parte Kershaw, re Woodhouse*, 45 L.T., 687; *Ex parte Kirkwood, re Mason*, 11 C.D., 724.

be forthwith filed (*n*). The petition is good, although filed after office hours, if it be filed in the proper office (*o*). Where there are no assets, there is no absolute rule that a debtor cannot file the petition, for if a debtor has no assets, but some person comes forward and offers to give security, such is an arrangement that can be properly carried out if it is made *bond fide* (*p*). CHAP. IX.

The first general meeting is held at the place mentioned in the affidavit referred to at a time between 10.30 a.m. and 4 p.m. on a day within six weeks from the filing of the petition unless the Court otherwise orders (*q*). The place may be changed by order of the Court (*r*), as provided by r. 383, *post*. The form of order is No. 155, *post*. Where the place of meeting mentioned in the notice was other than that named in the affidavit, no formal order of the Court having been made, the proceedings were held to be invalid, and the resolutions could not be registered (*s*). The debtor summons the meeting by sending by pre-paid post a notice in the form No. 149, Appendix, *post*, to each of his creditors, or if dead their personal representatives, or if out of the colony their agents (*t*). The form indicates that this notice should be signed by the debtor or his solicitor, but it need not be signed by the solicitor with his own hand, as it may be signed by his clerk by his direction (*u*). The first meeting.  
Place and time.  
Change of place.  
Form of order.  
Summoning of meeting.  
Form of notice.

The meeting can be adjourned by an ordinary resolution, that is a majority in value of the creditors present personally or by proxy and voting thereon (*v*). A formal resolution is necessary (*w*). Adjournment of meeting.

The meeting must be advertised as set out in r. 380 (3), *post*, and form 151, *post*, and the provisions of r. 381 must be followed as to the time and mode of posting the notices, and the affidavit of service in proof of posting is prescribed by r. 382, *post*. Advertisement and form of.  
Time and manner of posting notices.  
Proof of service.

The debtor must state in his petition the estimated amount of the debts owing by him to his creditors (*x*), and a majority in value of such creditors may at any time prior to the passing of Appointment of receiver by creditors and confirmation of same.

(*n*) R. 379.  
(*o*) *Ex parte Jones, re Williams*, 42 L.T., 157.  
(*p*) *Ex parte Hudson, in re Walton*, 22 C.D., 773, distinguishing *Ex parte Terrell*, 4 C.D., 293.  
(*q*) R. 380 (1).  
(*r*) *Ibid*.  
(*s*) *Re Mayer, ex parte Lewis*, 4 C.D.,

519.  
(*t*) R. 380 (2).  
(*u*) *Ex parte and in re Hirst*, 18 L.R., Eq., 704.  
(*v*) *Ex parte Orde, re Horsley*, 6 L.R. Ch., 881.  
(*w*) *Ibid*; *vide s. 153 (7), Act of 1890, and s. 73 (12), Act of 1897.*  
(*x*) *Vide form No. 147, and r. 384.*

## CHAP. IX.

Form of nomination.

the special or extraordinary resolution (as the case may be), nominate and appoint a receiver or manager of the trade effects or business of the debtor or any part thereof according to the form No. 152, *post* (y). Such nomination and appointment may be confirmed by the Court upon summary application in any case in which the debtor refuses to give possession or control to the receiver (z). The nomination paper must be in duplicate (a). As to the mode of signing same and verification of signatures or debts, *vide* r. 384, *post*.

Cancelling appointment.

The Court may at any time cancel the appointment by consent of the debtor, and of the creditor or creditors upon whose application the appointment was made, or if the Court see fit (b).

Duties of receiver or manager.

The receiver or manager must investigate the state of the debtor's affairs and report thereon to the general meeting of creditors (c). He is entitled to the custody of the books and effects of the debtor and the same must forthwith be delivered to him (d), but he must at all times permit the debtor or any of his creditors or their agents to have access to and inspect the debtor's books of accounts (e). His duties terminate upon the appointment of a trustee in liquidation and upon the approval of a composition in cases of composition unless the resolution for the latter otherwise provides (f), and he must render his accounts and act as provided by rule 389, *post*. The Court has the same power and discretion as to the remuneration and removal of the receiver or manager and in the settlement of his accounts and in directing the appropriation of moneys or property in his hands as it can exercise in the case of a trustee in insolvency (g).

Termination of receiver's duties.

Control of Court over receiver or manager.

Chairman.

The chairman of the first general meeting and of any subsequent general meeting is elected in the mode prescribed by r. 391, *post*.

Presence of creditor's solicitor at meeting.

A creditor is entitled to have his solicitor present at a meeting to watch his interests, and such solicitor, though not qualified to vote, may take objections to the proceedings of the meeting (h).

(y) R. 384.

(z) *Ibid*.(a) *Ibid*.

(b) R. 385.

(c) R. 384.

(d) R. 386.

(e) R. 387.

(f) R. 388.

(g) R. 390.

(h) *In re Dane*, 3 V.L.R. (I.), 19.

Debts may be proved by affidavit or declaration and proxies appointed as in insolvency (*i*). As to debts which may be proved *vide* r. 393. A form of proof is endorsed on the notice summoning meeting, form 150, *post*. The chairman, to whom all proofs and proxies intended to be used must be handed, must mark thereon any objection thereto, and such in cases of composition must be dealt with by the Court on its considering the composition, and in cases of liquidation by the chief clerk upon the extraordinary resolution therefor being presented to him for registration (*k*). A creditor who has objected to a proof and has had same duly marked is entitled to notice either by the chief clerk or the person whose duty it is to register the resolutions of the time and place where the application for registration is to be heard (*l*).

CHAP. IX.

Proofs and proxies.

Form of proof.

Objections to proofs and proxies.

How dealt with.

As to proof by secured creditors *vide* r. 395, *post*, and *vide* also "Proofs of Debt," at p. 308, *ante*.

Proof by secured creditor.

Where any creditor desires to retire from any meeting and not to be considered as present he may withdraw his proof without prejudice to his again proving his debt on any subsequent occasion (*m*). A person tendered a proof at a first meeting and withdrew it. It was held when afterwards he desired to oppose the registration of the resolutions that he had no *locus standi* and the proof could not be filed for such purpose (*n*); "subsequent occasion" in the rule means an occasion upon which debts can be proved at a meeting such as the statute prescribes (*o*).

Retiring from meeting.

Withdrawal of proof.

The debtor must produce to the first general meeting and also in case there be any to the second general meeting a statement showing the whole of his debts and assets and the names and addresses of the creditors to whom such debts respectively are due (*p*). The names must be numbered consecutively and the list of creditors whose debts do not exceed £25 must be separated from and follow after the list of those exceeding that amount (*q*). The form of statement is No. 153, Appendix, *post*, with such variations or additions as circumstances may require (*r*). Where a debt is

Debtor to produce statement at meeting.

Form of statement

(*i*) R. 392.

(*k*) R. 394.

(*l*) *Ex parte* and in *re* Lancaster, 5 C.D., 911.

(*m*) R. 396.

(*n*) *Ex parte* Kirkwood, in *re* Mason,

11 C.D., 724.

(*o*) *Ibid*, at p. 727.

(*p*) R. 397; ss. 153-4, Act of 1890.

(*q*) R. 397.

(*r*) *Ibid*.

**CHAP. IX.** on a bill of exchange or promissory note, the holder of which is then unknown, the amount of such bill or note, the date when the same will fall due, and the name of the acceptor or person to whom the same is payable, and the last known holder must be stated (*s*). The form of list to be added to statement where necessary is No. 154. Unless the statement be produced as prescribed the resolutions cannot be registered (*t*), and if for any reason the debtor is unable to produce a proper statement of affairs, he cannot have the benefit of the provisions of the Acts as to liquidation by arrangement or composition (*u*). The statement is the foundation of the entire proceeding, and so far as the Act is concerned it is the only material for deciding who are entitled to vote, or for ascertaining majorities, and if the same is not verified as required, the proceedings are invalid (*v*). The condition as to the names and addresses of the creditors are for the benefit of the creditors, and may consequently be waived by any creditor (*w*).

Attendance of  
debtor at  
meeting.

Production of  
statement when  
absent.

The debtor, unless prevented by sickness or other cause satisfactory to such meeting must be present at the meeting at which the extraordinary resolution is passed, and in composition at both meetings, and must answer any enquiries made of him, and he, or if he is so prevented from being at such meeting, some one on his behalf must produce to the meeting the statement in the prescribed form verified by the affidavit or declaration of the debtor (*x*). The answers may be taken as part of the statement of affairs (*y*). The object of the Act in directing the debtor to attend and answer the questions put to him is to secure an explanation upon such portions of the statement as the creditors require, and for any purpose for which the statement itself may be looked into the explanation of the statement given by the debtor may be taken into consideration. Such being so it is essential to have a written record of the answers, and therefore a shorthand writer can be

(*s*) Ss. 153-4, Act of 1890. In composition any other particulars within the debtor's knowledge respecting the same are also required, and the insertion of such particulars set out in s. 154 is deemed a sufficient description of the creditor of the debtor in respect of such debt; s. 154, *vide* form 154, *post*.

(*t*) *Ex parte Sidey*, 24 L.T. N.S., 401; *vide* also *Re Dane*, 3 V.L.R. (I.), 19.

(*u*) *Ex parte Solomon*, in *re Tilley*, 20 C.D., 281; *Ex parte and in re Amor*, 21 C.D., 594.

(*v*) *In re Dane*, *ante*.

(*w*) *Breslawer v. Brown*, 3 App. Cas., 672.

(*x*) Ss. 153-4, Act of 1890.

(*y*) *Ex parte and in re Aaronson*, 7 C.D., at p. 718; *vide* also *Ex parte Solomon*, in *re Tilley*, 20 C.D., 281.

present to take notes of the answers on behalf of the examining creditor (z). The meeting may limit the number of shorthand writers present if several creditors wish to employ them (a). The practice is to allow the debtor's solicitor to be present to protect him (b).

CHAP. IX.  
Presence of  
debtor's solicitor  
at meeting.

Any mistake made inadvertently by a debtor in the statement of his debts may by r. 405 be corrected with the assent of a majority in value of his creditors assembled at a general meeting similarly summoned by the debtor, and by s. 154 any such mistake made in such statement by a debtor in composition may be corrected after the prescribed notice has been given with the consent of a general meeting of his creditors.

Correction of  
mistakes in  
statement at  
meeting.

The resolution passed at the first general meeting (c) shall determine whether the affairs of the debtor are to be liquidated by arrangement and not in insolvency, or whether any and what composition shall be accepted in satisfaction of the debts due to the creditors from the debtor, or it may reject either of such modes of arrangement. The resolution may declare to whom the registration of the resolution and the debtor's statement of affairs shall be entrusted and the original resolution and the statement shall forthwith be delivered accordingly to the person so appointed (d), and in the event of no such declaration being made in the resolution the same must be registered by the debtor. Only such resolutions as are reduced into writing and are signed by or on behalf of the statutory majority of the creditors assembled at a meeting are taken cognisance of by the Court (e). A form of resolutions is given in form No. 157, *post*, and the list of creditors to be used at every meeting is form No. 156, *post*. The signatures of the creditors may be subscribed subsequently to the meeting but prior to the filing or registration of the resolution (f). It is necessary for the creditor to evidence his assent by signing the resolution when reduced to writing, and absence of the signature is construed as voting in the negative (g). After

Resolutions as  
to arrangement  
or composition  
to be passed and  
registered.

Signing of  
resolution.

Form of  
resolution.

(z) *Ex parte Aaronson, ante; Ex parte Solomon, ante.*

(a) *Ex parte Solomon, ante.*

(b) *Ibid.*, at p. 286.

(c) Or first and second general meetings as the case may be.

(d) When the debtor's solicitor is the person so entrusted he need not

register it personally but may employ his clerk or client; *In re Dane*, 3 V.L.R. (I.), 19, 26; *vide* also s. 73 (2), Act of 1897.

(e) R. 398.

(f) R. 398.

(g) *Ex parte Orde, re Horsley*, 6 L.R., Ch., 881.

**CHAP. IX.** the resolution has been filed by the person entrusted therewith it is too late for a creditor to sign it (*h*). Partners may sign by a member of the firm in the name or style of the firm (*i*).

Validity of resolutions.

Fraud vitiates the resolutions and the registration will, in such case be vacated as where a creditor has been bribed, even though if the vote thus procured were struck off, a statutory majority in favor of the discharge would remain (*k*).

Fraud.

Evasion of the Act.

Resolutions which, so far as their form goes, are resolutions for liquidation by arrangement, but amount in fact to resolutions for a composition, are an evasion of the Act and should not be registered (*l*); as where it was resolved that on payment of the sum of one shilling in the pound on the amount of the debts payable by instalments the debtor should be entitled to a discharge (*m*). A resolution to accept a lump sum in satisfaction of the creditors' right to apply to the Court in reference to the pay of the debtor is a proper resolution (*n*), and so also is that to accept a lump sum and a bond for a further sum for the discharge of the debtor (*o*). On the opposition of a creditor in an estate where the assets were small—amounting to £32 and the debts to £540—the registration was refused, the petition being held to be an abuse of the procedure of the Court (*p*); but want of *bonâ fides* will not necessarily be imputed owing to the smallness of the assets immediately available if the debtor has substantial *bonâ fide* claims the subject of pending litigation (*q*), and though the assets are small the resolutions will be registered where otherwise they would be swept away by a judgment creditor (*r*). Where the debtor has practically no assets distributable amongst his creditors the resolutions should not be registered even though a discharge to the debtor is not included (*s*). This rule does not apply to cases where the debtor having no assets security is found

Abuse of the procedure.

Smallness of assets and no assets.

(*h*) *Ex parte Thorne, re Butlin*, 8 L.R., Ch., 722.

(*i*) S. 22, Act of 1890; r. 285, *vide* example therein.

(*k*) *Ex parte and re Baum*, 7 C.D., 719; *vide* also *In re Dane*, 3 V.L.R. (I.), 19, and s. 155—compare 32 & 33 Vict. c. 71, s. 127.

(*l*) *Ex parte Harold, re Meade*, 3 C.D., 119.

(*m*) *Ibid.*

(*n*) *Ex parte Pooley, re Russell*, 5

L.R., Ch., 722.

(*o*) *Ibid.*

(*p*) *Ex parte and re Staff*, 20 L.R. Eq., 775, *vide* also *Ex parte Ball, re Parnell*, 20 C.D., 670.

(*q*) *Ex parte and re Hope*, 9 C.D., 398.

(*r*) *Ex parte Matthewes, re Sharpe*, 16 C.D., 655, distinguishing *Ex parte Staff*, *ante*.

(*s*) *Ex parte and re Aaronson*, 7 C.D., 713.



by a third person (*t*). There is no hard and fast rule as to the amount of a composition which may be accepted except that the sum must not be so small that no reasonable man would accept it, for in such a case the amount would in itself be evidence of want of *bonâ fides*. There is no absolute rule that a debtor who has no assets cannot file a liquidation petition (*t*).

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The chairman is bound forthwith to deliver to the person (if any), so appointed or in default of such appointment to the debtor every declaration or affidavit for proof of debt and proxy paper of what nature or kind soever, and whether in due form or otherwise which shall have been received at the general meeting or meetings, and also the debtor's statement of affairs, and in default thereof may be summoned before the Court, and the Court may make such order in the matter as it thinks fit (*u*).

Chairman to deliver proofs, proxies and statement to the person appointed by creditors or to debtor.

The person to whom the registration of the extraordinary resolution may have been entrusted or the debtor or his solicitor as the case may be must file the same in Court together with the debtor's statement of affairs and all proofs and proxies within three days after he has received the same, or in default thereof he may be summoned before the Court, and some person able to depose thereto must verify and identify the resolutions, statement, proofs and proxies so filed as being the whole of the resolutions, statement, proofs and proxies come to and produced at the meeting or meetings when such extraordinary resolution was passed (*v*).

Filing resolutions, statement, proofs and proxies.

Verification.

The form of affidavit of verification is No. 158, *post*.

Form of affidavit.

As to the procedure in regard to the meetings in case of proceedings instituted by debtors who are partners and the application of any surplus, *vide* r. 401, *post*.

Meetings in case of partnerships.

As to resolutions in cases where any two or more partners constitute a separate and independent firm and the application of any surplus, *vide* r. 402, *post*.

Resolutions in same.

Creditors and debts include not only those to whom and for which the debtor is individually responsible, but also those creditors and debts to whom or in respect of which he is also responsible jointly with any other person or persons (*w*). The statutory

Partnerships and joint and separate creditors.

(*t*) *Ex parte Hudson, re Walton*, 22 C.D., 773; see also cases, *post*, as to the Court's approval.

(*u*) R. 399.  
(*v*) R. 400.  
(*w*) R. 403.

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majority required for the purpose of any resolution is a collective majority of the whole of such joint and separate creditors at any meeting (*x*). The terms of the resolution need not be identical and if so desired the terms of the resolution may provide for the payment of a composition to the separate creditors and that the rights of the joint creditors shall not be prejudiced or affected thereby (*x*).

It is the duty of the debtor to distinguish between his joint and separate assets and liabilities (*y*), and where he did not so distinguish registration was refused (*z*), and where he carried on one business alone and another in partnership, his partner being solvent, it was held necessary for him in his statement to set out the assets and liabilities of the partnership business in detail as well as his own, and also to state the account between himself and his partner to show the balance due, if any, to him (*a*). The liquidation of one of joint debtors does not prevent a creditor of such proceeding against the joint debtors (*b*).

Resolutions  
unaffected by  
adjournment.

The resolutions duly come to at any meeting have full force and effect notwithstanding it may be also resolved that for other purposes the meeting stands adjourned (*c*). The meeting can be adjourned by an ordinary resolution that is a majority in value of the creditors present personally or by proxy and voting on such formally (*d*).

Inspection of  
resolution and  
statement.

The resolutions, statement and all other proceedings when filed or registered are at all times open for inspection by the official accountant and any creditor whose name appears on the statement, or by any person duly authorised on his behalf (*e*). In composition every resolution and statement presented to the chief clerk is open for public inspection on payment of the prescribed fee (*f*), and by s. 126, Act of 1897, all proceedings of the Court may at all reasonable times be inspected by any person.

Costs of  
arrangement or  
composition  
upon insolvency.

As to costs of arrangement or composition upon insolvency intervening, *vide* p. 60, Chapter II., *ante*.

(*x*) R. 403.  
(*y*) *Ex parte Cockayne*, 16 L.R. Eq., 218; and *Ex parte and re Buckley*, 16 C.D., 513.  
(*z*) *Ibid*.  
(*a*) *Ex parte and re Amor*, 21 C.D., 594.

(*b*) *Re De Vecchj, ex parte Isaac*, 6 L.R. Ch., 58.  
(*c*) R. 404.  
(*d*) *Ex parte Orde, re Horsley*, 6 L.R. Ch., 881.  
(*e*) R. 406.  
(*f*) S. 73 (15), Act of 1897.

General meetings subsequent to the appointment of a trustee are be summoned by him by giving four days notice by post to each of the creditors who have proved their debts, stating the object of the meeting and the business proposed to be transacted thereat (*g*). A general meeting may, however, at any time be similarly summoned by any creditor with the concurrence, including himself, of one sixth in number and value of the creditors who have proved their debts (*h*). Proof of debt by any creditor is deemed conclusive evidence that notice of all general meetings prior to and inclusive of that at which such proof is produced has been duly given to him (*i*). The proof may be made on the third side of the notice summoning the first general meeting; *vide* form No. 150, *post*.

CHAP. IX.

Summoning of general meetings.

Proof of debt admits notice of meeting.

### 3.—PROCEEDINGS RESTRICTED TO LIQUIDATION BY ARRANGEMENT.

In addition to the proceedings common to both liquidation by arrangement and composition there are certain matters which are restricted to liquidation, as follows :—

The liquidation is deemed to have commenced as from the date of the appointment of the trustee (*k*). The creditors may at the first general meeting, or at some subsequent meeting, held at an interval of not more than a week, appoint a trustee with or without a committee of inspection (*l*). Where no committee is appointed the trustee may act on his own discretion in cases where he would otherwise have been bound to refer to such committee (*m*). The remuneration of the trustee is fixed by the creditors by special resolution at a general meeting (*n*). If no trustee is appointed at the meeting, or if appointed he declines or becomes incapable of acting or is removed and no other trustee is then appointed, then and in any of such cases the Court may appoint one as in the case of insolvency (*o*). The trustee may be removed by special resolution at a general meeting summoned for that purpose, and another trustee appointed in his place by a majority in value of the creditors then present or

Commencement of the liquidation.

Appointment of trustee and committee of inspection.

Remuneration.

Appointment of trustee by Court.

Removal or death of trustee and appointment of new trustee.

(*g*) R. 409.

(*h*) *Ibid*.

(*i*) R. 408.

(*k*) S. 153 (4), Act of 1890.

(*l*) S. 153 (1), Act of 1890.

(*m*) *Ibid* (14). R. 374, however, pro-

vides that where there is no committee any functions of the committee may be exercised by the official accountant.

(*n*) R. 413.

(*o*) R. 410.

## CHAP. IX.

Evidence of a trustee's appointment.

Certificate of appointment and form thereof.

Application of Acts to trustees in liquidation.

Vesting of property in trustee and void transactions.

Distribution of property.

Property acquired after discharge.

Effect of liquidation on actions and suits.

represented (*p*), and where a trustee dies, or where for any reason there is no trustee acting, a general meeting may be summoned, and another trustee appointed as in the case of removal (*q*). The resolution must be registered by the chief clerk (*r*). The certificate of the chief clerk is conclusive evidence of the appointment of any trustee in liquidation (*s*). The certificate is form No. 159, *post*, which is delivered after the registration of the extraordinary resolution (*t*).

The provisions of the Insolvency Acts with respect to the duties, liabilities and responsibilities of and accounting by a trustee in insolvency apply as nearly as may be to a trustee in liquidation (*u*).

All the property of the debtor vests in the trustee from and after the date of his appointment, and is divisible amongst the creditors (*v*). All such settlements, conveyances, transfers, charges, payments, obligations and proceedings as would be void against the trustee in the case of sequestration are void against the trustee in liquidation (*w*).

The property of the debtor is distributed in the same manner as in an insolvency (*x*). The joint and separate estates of a partnership firm are vested in the trustee appointed by the joint creditors, and if no resolution is passed by the separate creditors, the trustee must administer the separate estate according to the laws of bankruptcy (*y*). The discharge by the joint creditors does not affect the separate debts in such a case (*z*).

Property acquired after the grant of the debtor's discharge by the creditors belongs to the debtor, although no resolution closing the liquidation has been passed (*a*), but where there is no such discharge the after-acquired property vests in the trustee (*b*).

No action or suit save as provided in s. 153 (XI.), Act of 1890, can be commenced or carried on against any debtor whose affairs

(*p*) R. 411.

(*q*) *Ibid*.

(*r*) R. 412.

(*s*) S. 153 (6), Act of 1890; r. 412.

(*t*) R. 416.

(*u*) S. 115, Act of 1897; *vide* also s. 153 (7), Act of 1890.

(*v*) S. 153 (5), Act of 1890.

(*w*) *Ibid*.

(*x*) *Ibid* (7).

(*y*) *Ebbs v. Boulnois*, 10 L.R., Ch., 479.

(*z*) *Ibid*.

(*a*) *Ibid*; *Re Bennett*, 10 L.R., Ch., 490.

(*b*) *Ex parte Wainwright*, 19 C.D., 140.

are liquidated by arrangement for a debt provable under the liquidation (c), and an attachment will not be granted against a defendant for non-payment of a debt and costs (d). CHAP. IX.

The creditors at any general meeting may prescribe the bank into which the trustee is to pay any moneys received by him and the sum which he may retain in his hands (e). No formal resolution is necessary for this purpose (f). It has been held the penalties prescribed by s. 89, Act of 1890 (g) on a trustee for retaining money in his hands do not apply to trustees in liquidation, the section being penal and not transferable from insolvency to liquidation without clear words (h), *sed vide* at p. 422, "Application of Acts to Trustees in Liquidation." Payments into bank.

With the exception of Part VIII., Act of 1890, all the provisions of the Acts, so far as they are applicable, apply to liquidation, and in construing such provisions the appointment of a trustee under a liquidation is, according to circumstances, deemed to be equivalent to and a substitute for the order of sequestration or the service of such order (i). It is also specifically enacted (k) that all the provisions of the Acts relating to the meeting for the election of a trustee and to other meetings of creditors including the description of creditors entitled to vote at such and the debts in respect of which they are entitled to vote apply respectively to such, subject to the modification contained in the sub-section quoted. A creditor cannot vote until he has proved his debt, and any wilfully false declaration in relation to such debt is a misdemeanour (l). All creditors present personally or by proxy are to be considered as voting on every resolution so long as their proofs are in the hands of the chairman (m). General applicability of Acts to Liquidation.

All the rules relating to proceedings of every kind under sequestration so far as the same are applicable and do not conflict with Part IV. of the rules and can be applied are deemed to apply to proceedings in liquidation (n). Applicability of rules.

(c) S. 153 (xi.), Act of 1890.  
 (d) *England v. Moore*, 6 V.L.R. (E.), 48.  
 (e) S. 153 (8), Act of 1890.  
 (f) *Ex parte Old, re Bright*, 17 L.R., Eq., 457.  
 (g) *Vide* also ss. 53, 54, Act of 1897.  
 (h) *Ex parte Brooker, in re Fastnedge*, 2 C.D., 57.

(i) S. 153 (7), Act of 1890 ; s. 1, Act of 1897.  
 (k) S. 153 (2), Act of 1890 ; s. 1, Act of 1897.  
 (l) S. 153 (2), *ante*.  
 (m) *Ex parte Orde, re Horsley*, 6 L.R., Ch., 881.  
 (n) R. 433.

CHAP. IX.	Rules of Court may be made to the same extent and of the
Power to make rules.	same authority as in respect of proceedings under a liquidation (o).
Transfer of proceedings.	In the event of liquidation being resolved upon the creditors at any general meeting may include in such resolution a request that the proceedings be conducted in some other district and thereupon the judge must direct accordingly (p).
Presentation and registration of resolution.	The extraordinary resolution, together with the statement and the names of the trustee and members (if any) of the committee of inspection, must be presented to the chief clerk, who must examine and inquire if it has been passed in manner directed by the section and may hear any creditor who shall have given him notice of his desire to be heard thereon. If satisfied that it was so passed and that the Acts and rules have been complied with and that a trustee has been appointed with or without a committee he must forthwith register the resolution and statement (q). It is the duty of the chief clerk himself to enquire into the regularity of the proceedings, especially so if his attention is attracted by a caveat and objections, and if a caveat has been lodged its withdrawal does not form a reason for his at once registering (r).
Hearing of creditor.	
Certification of ground of refusal.	When the chief clerk refuses to register the resolution he must certify the grounds of such refusal and file such with the proceedings (s). Informality in the resolution or proofs or proxies is not a ground for objection to or refusal by the chief clerk unless he is of opinion that it is a matter of moment, in which event he must refer the matter to the judge (t).
Informality.	
Application to cancel registration by creditor or the debtor.	Any creditor or the debtor if dissatisfied with the registration or non-registration of the resolution may apply to the Court for a rule calling upon such parties as the Court may think fit to show cause why the registration should not be made or be cancelled as the case may be (u). This rule assumes that the Court is not bound by the registration as to the conclusiveness of the regularity of all the proceedings preliminary to the resolutions (v).
Evidence of debtor's compliance with Acts.	As to what is deemed evidence that the debtor has complied <div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> <p>(o) S. 153 (12), ante.</p> <p>(p) R. 414.</p> <p>(q) S. 153 (4), Act of 1890; r. 416, which see for mode of registration.</p> <p>(r) <i>In re Bateman</i>, 1 V.L.R. (I.), at p. 55; vide also <i>Ex parte Levy, re Varbe-</i></p> </div> <div style="width: 45%;"> <p><i>tian</i>, 11 L.R., Eq., 619.</p> <p>(s) R. 416.</p> <p>(t) R. 417.</p> <p>(u) R. 419.</p> <p>(v) <i>In re Dane</i>, 3 V.L.R. (I.), at p. 25.</p> </div> </div>

with the Acts *vide* r. 418, *post*, and see also the same rule as to the debtor's duty to assist the trustee. Registration of the resolutions is in the absence of fraud, conclusive evidence that such were duly passed, and all the requisitions of the Acts in respect of the same complied with (*w*). Though registered some of the resolutions may be *ultra vires*, and therefore void; the others however may be registered, and if registered are not invalid (*x*).

CHAP. IX.

Debtor's assistance to trustee.

Registration evidence.

Creditors may after the registration of the resolution prove their debts, and appoint proxies as under a sequestration (*y*), but all debts must be proved prior to the payment of dividend thereon by the trustee (*z*). The notice by trustee to creditors to come in and prove is form 160, Appendix, *post*.

Proof of debt.

As to the rejection of the claim or proof of any creditor by the trustee *vide* r. 425, *post*. Form of notice of rejection is No. 161, Appendix, *post*.

Rejection of claim to prove and form of notice.

As to the notice before dividend, reservation of dividends and as to what creditors are entitled to dividends, *vide* rr. 423 and 426, *post*.

Dividends.

A discharge may be granted to the debtor by three-fourths in number and value of the creditors who have proved debts (*a*). Such discharge must be in the prescribed form (*vide* form No. 163, *post*), and given in the prescribed manner, and at the prescribed time (*b*); *vide* rr. 427, 428 and 429, *post*, as to procedure. The trustee must report (*vide* r. 429) to the chief clerk the discharge of the debtor, and the certificate of discharge given by the chief clerk has the same effect as a certificate of discharge given to an insolvent under the Act (*c*). The form of trustee's report is No. 164, *post*, and that of the chief clerk's certificate No. 165, *post*. The certificate is a valid defence to an action by a creditor whose name has been omitted from the statement of debts (*d*), and though he had no notice of the proceedings in liquidation (*e*), and though the name may have been fraudulently

Discharge of debtor.

Form.

Form of trustee's report.

(*w*) S. 155, Act of 1890. *In re Bateman*, 1 V.L.R. (I.), 52; see *In re Dane*, 3 V.L.R. (I.), 25.

(*x*) *Ex parte Ashworth, re Hoare*, 18 L.R., Eq., 705; *Ex parte Browning, re Marks*, 9 L.R., Ch., 583; *Ex parte Frampton, re Watkins*, 45 L.T., 720; *Ex parte and re Hope*, 9 C.D., 398.

(*y*) R. 421.

(*z*) R. 424.

(*a*) S. 153 (10), Act of 1890.

(*b*) *Ibid*.

(*c*) S. 153 (10), *ante*.

(*d*) *Elmslie v. Corrie*, 4 Q.B.D., 295.

(*e*) *Heather v. Webb*, 2 C.P.D., 1.

CHAP. IX. omitted (*f*). The remedy in such a case is to have the registration vacated, and the certificate cancelled (*g*). The certificate is conclusive evidence of the validity of the liquidation proceedings (*h*).

Effect on  
sureties and  
co-debtors.

Sureties remain liable as in insolvency (*i*), and any co-debtor of the debtor remains liable to be sued by a joint creditor though the creditor is a party to the release (*k*). When a debt is joint and several a composition on the joint debt is not a satisfaction of the separate liability of any of the debtors (*l*).

Setting aside  
discharge.

The Court may set aside the discharge upon the application of any creditor if it appears that it was obtained by fraud or by giving any preference to one creditor over another or if the debtor has been guilty of any felony or misdemeanour under the Acts (*m*).

Release of  
trustee.

The release of the trustee may be granted by a special resolution of the creditors in general meeting and the accounts may be audited in pursuance of such resolution at such time and in such manner and upon such terms and conditions as the creditors think fit (*n*). As to the submission by the trustee of his account, *vide* r. 430 (1), and form 93, Appendix, *post*. The release does not take effect unless and until he has filed the summary and affidavit mentioned in the rule lastly referred to and complied with s. 59, Act of 1897 (*o*). Notwithstanding the grant of the release the trustee can be ordered to pay a dividend to a creditor where prior to the release he had sold the estate for a sum equal to a certain dividend upon the amount of the provable debts and the money to pay was in his hands (*p*); but where the trustee owed rent for lease of a property occupied during the liquidation it was held that the Court of Bankruptcy had no jurisdiction to order the trustee who had obtained his release without fraud to pay the rent (*q*). The trustee, though released is entitled to receive and give a discharge for assets becoming the property of the estate

(*f*) *Wadsworth v. Pickles*, 5 Q.B.D., 470.

(*g*) *Ibid*; *Elmalie v. Corrie*, *ante*.

(*h*) *Lewis v. Leonard*, 5 Ex. D., 165.

(*i*) *Ellis v. Wilmot*, 10 L.R. (Ex.), 10.

(*k*) *Megrath v. Gray*, L.R., 9 C.P., 216.

(*l*) *Simpson v. Henning*, L.R. 10 Q.B., 406.

(*m*) S. 153 (10), *ante*; s. 1, Act of 1897.

(*n*) S. 153 (9), *ante*.

(*o*) R. 430 (2).

(*p*) *In re Prager, ex parte Société Cockrill*, 3 C.D., 115.

(*q*) *Ex parte Carter, in re Ware*, 8 C.D., 731, distinguishing *In re Prager, ante*.



after his release and the close of the liquidation, and it is his duty to distribute same (r). CHAP. IX.

As to the proceedings to recover balance remaining unpaid of a debt where a debtor has not obtained his discharge within three years from the commencement of the liquidation, *vide* s. 153 (11), and rr. 431 and 432, *post*. Proceedings to recover balance of debt from undischarged debtor.

All proper costs of and incidental to the proceedings prior to the passing of the resolution, are paid by the trustee out of the estate in like manner and priority as the costs of a petitioning creditor in insolvency (s). Costs of liquidation by arrangement.

If it appear to the Court on satisfactory evidence that the liquidation cannot in consequence of legal difficulties or of there being no trustee for the time being or for any sufficient cause proceed without injustice or undue delay to the creditors or to the debtor the Court may on the petition of the trustee or of any creditor whose debt amounts to fifty pounds and upwards sequester the property of the debtor and proceedings may be had accordingly (t). As to the accounting by the trustee and the equalizing of dividends on sequestration happening, *vide* r. 415, *post*. R. 420 authorises the Court also to sequester the estate on petition of a creditor whose debt is £50 or upwards if the petition (form No. 162, in Appendix) shows that the creditor had no notice of the meeting at which the liquidation was agreed to, and that he dissents from the same, and that his vote would have altered the result arrived at. The Court may, on a creditor's petition, irrespective of the amount of the debt, order that the liquidation be not proceeded with (u). Every such petition must be heard upon affidavit, and it must be presented within thirty days from the date of the meeting at which the liquidation was agreed upon (v). Sequestration of estate by Court. Form of petition. Power to stay liquidation.

On the death of the debtor occurring after the filing of the petition it was held that the Court had no jurisdiction to order the continuance of the proceedings, which were consequently stayed by the death (w). Death of debtor.

(r) *Ex parte Witt, re Armstrong*, 27 W.R., 888.

(s) R. 422.

(t) S. 153 (13), *ante*.

(u) R. 420—compare r. 143, Rules of

1890, which applied to composition also.

(v) *Ibid*.

(w) *Re Obbard*, 19 W.R., 563.

## CHAP. IX.

## 4.—PROCEEDINGS RESTRICTED TO COMPOSITION.

The proceedings and matters incidental to the same restricted to and applying to composition in addition to those common to both liquidation by arrangement and composition are as follows:—

The first meeting.  
Essentials of the resolution.

The first meeting has already been adverted to (*x*), and also the nature of the extraordinary resolution (*y*). In passing the resolution it is necessary to specify in it the amount of the composition, the instalments and dates at which the same are payable (*z*). The trustee may also be named, and any negotiable securities which may be given for the composition (*a*). Instead of specifying the security to be given, the creditors may resolve that the composition or some part or instalment thereof may be secured in such manner as may be approved by a creditor or creditors to be named by the resolution (*b*). Forms of resolutions at first general meeting are given in form 166, *post*.

As to security for the composition.

Form of resolutions at first general meeting.

Sureties for payment.

In accepting a composition, the creditors agreed that as security for its payment the debtor should assign all his property to a trustee, and that the security of the trustee should be accepted for the composition. The trustee took an absolute assignment to himself, paid the composition and realised a surplus. In such circumstances it was held that he was absolutely entitled to the property, and that there was no resulting trust of the surplus in favor of the debtor (*c*). The surety is considered to enter into his contract with the knowledge that the creditors are remitted back to their original rights in default of payment of any instalment of the composition, and in the event of insolvency supervening the creditors can therefore prove for the whole amount of their debts, less any instalment paid which cannot be recovered back by the surety, his remedy being to prove on the estate (*d*). If the surety fails to pay, the trustee can sue him at law (*e*). The Court has power to order the trustee to sue the surety on his covenant, but the order should provide for the indemnity of the trustee against the costs of the action (*f*). The surety is entitled

(*x*) *Vide* p. 413, *ante*.

(*y*) *Vide* pp. 412-417, *ante*.

(*z*) R. 434.

(*a*) *Ibid*.

(*b*) R. 435.

(*c*) *Ex parte Wilcocks*, 44 L.J. (Bky.), 12.

(*d*) *Ex parte Gilbey, re Bedell*, 8 C.D., 248.

(*e*) *Ex parte Mirabita, re Dale*, 20 L.R. (Eq.), 772.

(*f*) *Ex parte Monkhouse, re Dale*, 1 C.D., 287; and *vide* s. 154, as to enforcement of provisions of composition.

to retain security given to him by the debtor without the knowledge of the creditors if he carries out his guarantee (g). CHAP. IX.

Provision for costs should be made in the resolution, for where creditors employ a solicitor and omit to do so the Court cannot enforce payment of costs by the debtor (h). As to costs when sequestration occurs, *vide ante*, at p. 60. Provision for costs in resolution.

As to providing in the resolution for a deed of composition or inspectorship, and as to the provisions of the same, *vide* r. 426, *post*. Provision for deed of composition or inspectorship.

The resolution passed at the first general meeting must be filed with the statement, proofs and proxies within three days from the date of such meeting (i). Filing of resolution, statements proofs and proxies.

The second general meeting is held at an interval of not less than seven days nor more than fourteen days from the date of the meeting at which the resolution was first passed (k). This meeting is held at the same place as the first unless the resolution otherwise directs (l). The second meeting.  
Time.  
Place.

Notice of the meeting, form No. 167, *post*, must be given as directed in r. 437 (1), and notice of the meeting in the form No. 151, *post*, must be advertised in the manner directed by the same rule (m). Notice and advertisement.  
Forms of same.

The creditors assembled at the second general meeting may confirm the resolution passed at the first general meeting or they may pass an extraordinary resolution that the affairs of the debtor are to be liquidated by arrangement and not in insolvency, or a majority of them may pass a resolution requesting the debtor to surrender his estate under Part III., Act of 1890 (n). The form of resolution at the second general meeting is given in form 168, *post*. The creditors can adjourn the meeting if it has been duly convened to confirm the resolution (o). If the composition is rejected at the first meeting but subsequently accepted at an Powers of creditors at second general meeting.  
  
Form of resolution at second general meeting.  
Adjournment.

(g) *Ex parte Burrell, re Robinson*, 1 C.D., 537.

(h) *Re Pratte, ex parte Gush*, 12 C.D., 915.

(i) R. 437 (1).

(k) *Ibid*.

(l) *Ibid*.

(m) R. 437 (2).

(n) R. 438.

(o) *Ex parte Knowles, re Jones*, 44 L.T., 160.

**CHAP. IX.** adjourned meeting the adjournment and all subsequent proceedings are invalid (*p*).

Appointment of trustee.

The appointment of a trustee for the receipt and distribution of the composition may be made by the creditors at the first meeting (*q*). After the composition has been approved of by the Court he must give security in like manner as if he were a trustee in insolvency, and if he fails to do so within seven days after his appointment he may be removed by the Court (*r*). In every case where a trustee is not appointed, or if appointed declines to act or becomes incapable of acting, or is removed, the Court has the same power of appointing a trustee for the purpose of receiving and distributing the composition, or for the purpose of carrying out the terms of the composition as the case may be, as in the case of a vacancy occurring in the office of a trustee in insolvency (*s*).

Security by trustee.

Cases in which the Court may appoint a trustee.

Application of Acts to trustee in composition.

The provisions of the Acts with respect to the duties, liabilities and responsibilities of and accounting by a trustee in insolvency apply as nearly as may be to a trustee in composition (*t*).

Presentation of the resolution.

The extraordinary resolution together with the statement must be presented or be caused to be presented to the chief clerk by the chairman of the meeting at which it is agreed to, or by the debtor within three days after the same is agreed to or within such further time not exceeding in the whole ten days from the date at which the resolution was agreed to as the Court may allow (*u*). Unless such provision is complied with the resolution cannot be registered (*v*). It is the duty of the chief clerk on presentation of the resolution to enquire whether such resolution has been passed in manner directed by s. 154, Act of 1890, and if satisfied that it has been so passed, and on being ordered by the Court to register the same he must register the resolution (*w*). The chief clerk registers the same by making a memorandum on the extraordinary resolution for composition and on the debtor's statement of affairs as follows:—Registered the       day of

Duty of chief clerk thereon.

Order of Court as to registration.

18   , and affixes the seal of the Court thereto (*x*). The resolution

(*p*) *Ex parte Till, re Ratcliffe*, 10 L.R., Ch., 631.

(*q*) R. 434.

(*r*) R. 440.

(*s*) R. 439.

(*t*) S. 115, Act of 1897.

(*u*) S. 154, Act of 1890; s. 73 (2), Act of 1897.

(*v*) S. 73 (2), *ante*.

(*w*) S. 154, Act of 1890; s. 73 (1), Act of 1897.

(*x*) R. 444.

cannot be registered until so ordered by the Court (*y*), and until such registration the resolution is of no validity (*z*). CHAP. IX.

The debtor or any creditor may, within fourteen days from the presentation of the resolution, apply to the Court to appoint a day to consider the composition, which day must not be earlier than fourteen days from such presentation (*a*). The form of application and order thereon is No. 169, *post*. Notice of such appointment must be given by advertisement and in such other manner as the Court may direct (*b*). R. 441, *post*, directs the mode of such advertisement, the form of notice is No. 170, *post*. Notice must also be sent to the trustee, the official accountant and to every creditor, whether such creditor has proved or not, seven days at least before the day appointed (*c*). The form of same is No. 170, *post*, and that of the affidavit of postage of notices is No. 171, *post*. The Court may hear the official accountant without notice (*d*) and it may also hear any creditor who has filed in Court, three days at least before the day so appointed, a notice of his intention to oppose the composition (*e*). The form of notice of opposition is No. 172, *post*. The debtor or any creditor may, without notice, be heard in favor thereof (*f*).

Consideration of composition by Court.

Form of application and order.

Notice of appointment by advertisement and form.

Notice to trustee, official accountant and creditors.

Form of same and affidavit.

Opposition and support.

Form of notice of opposition.

If the Court is of opinion that the terms of a composition are not reasonable or are not calculated to benefit the general body of creditors or if any such facts are proved as would, under the Acts, require or justify the Court in the case of insolvency, in refusing or suspending a certificate or in punishing the insolvent, the Court must refuse to approve the composition (*g*). In any other case the Court may either approve or refuse to approve the composition (*h*). If the Court refuses to approve the resolution cannot be registered and the composition proposed has no force or effect (*i*), and in such case no costs incurred by a debtor or incidental to an application to approve of a composition can be allowed out of the estate (*k*). If the Court approves the same is testified by the terms being embodied in an order of the Court (*l*). The order must be in the form No. 173, *post*, with such variations

Powers of Court.

Effect of refusal to approve.

Approval and order and form thereof.

(*y*) S. 73 (1), Act of 1897.

(*z*) S. 154, Act of 1890.

(*a*) S. 73 (3), Act of 1897.

(*b*) *Ibid*.

(*c*) R. 441.

(*d*) *Ibid*.

(*e*) *Ibid*. S. 73 (4), Act of 1897.

(*f*) *Ibid*.

(*g*) S. 73 (5), Act of 1897.

(*h*) *Ibid*.

(*i*) *Ibid* (6).

(*k*) R. 442.

(*l*) S. 73 (7), Act of 1897.

## CHAP. IX.

Correction of  
formal slips by  
Court.

as circumstances may require (*m*). At the time the Court approves it may correct or supply any accidental or formal slip, error or omission in the composition, but no alteration in the substance of it can be made (*n*).

Effect and  
purpose of the  
powers of the  
Court.

The power given to the Court by s. 73 (5), Act of 1897, takes away that of the majority of the creditors which they formerly possessed and places in the hands of the Court the controlling power in composition for the purposes, it has been held, of protecting such creditors against their own recklessness; for preventing a majority of creditors from dealing recklessly, not only with their own property but with that of the minority of the creditors, and for the purpose of enforcing, as far as the legislature could, a more careful and moral conduct on the part of persons who eventually become insolvent debtors (*o*). The Court in deciding on the terms of the composition must exercise its own judgment and must not be influenced by the wishes of the majority of the creditors (*p*). Both the interest of the creditors and the conduct of the debtor should be considered (*q*). The Court must have regard to the debtor's assets and liabilities, and if the Court considers that the proofs tendered require to be investigated, or if for a large proportion of debts no proofs have been tendered, the Court should decline to approve (*r*), and though the Court sees that the majority of the creditors have been acting *bond fide* in the interests of the creditors, and that better terms cannot be obtained, it is not bound to approve of the resolutions, as it must look to all the circumstances, and have regard to the moral aspect of the case, and if it can see that the composition is to be paid to hush up and prevent investigation in some discreditable transaction, its approval should be refused (*s*).

Course for Court  
to adopt.

Cases in which  
the Court must  
refuse approval.

The cases in which the Court must refuse to approve the composition are those in which its terms are not reasonable or are not calculated to benefit the general body of creditors (*t*), or

(*m*) R. 442.

(*n*) R. 443.

(*o*) *In re and ex parte Reed*, 3 Morrell, at p. 98; 17 Q.B.D., at p. 251.

(*p*) *Ibid*; *Ex parte Campbell*, in *re Wallace*, 15 Q.B.D., 213; 2 Morrell, 167.

(*q*) *Ex parte Kearsley*, in *re Genese*, 18 Q.B.D., 168; 3 Morrell, 274.

(*r*) *Ex parte and in re Rogers*, 13

Q.B.D., 438; 1 Morrell, 159.

(*s*) *Ex parte Stracbridge*, *re Hickman*, 25 C.D., 266.

(*t*) It was always held as a principle that the majority of creditors in binding the minority must act genuinely for the benefit of the creditors and not in the interest of the debtor; *Ex parte Page*, 2 C.D., 323; *Ex parte Hudson*, *re Walton*, 22 C.D., 773; *Ex parte*

if any such facts are proved which would require or justify the Court in the case of insolvency in refusing or suspending a certificate or in punishing the insolvent (*u*). Further the Court cannot approve of the composition unless it provides for the payment in priority to other debts of all debts directed to be paid in the distribution of the property of an insolvent (*v*). In any other case the Court may refuse or approve (*w*). In such discretionary cases all matters must be weighed and the discretion exercised (*x*).

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As to priorities and preferential debts.

Discretionary cases.

Where the composition was small in amount the inference was drawn that the proceedings were for the benefit of the debtor and not for that of the general body of creditors and were consequently unreasonable (*y*), and also where it was considered that certain creditors voted in the interests of the debtor (*z*). Assuming that the composition is not so small that no reasonable man could accept it (for in such a case the amount would in itself be evidence of want of *bona fides*) the amount of the composition is a matter of discretion and there is no hard and fast rule as to the amount which may be accepted (*a*). A composition accepted from a debtor who has no assets is regarded as passed in his interests (*b*). It is otherwise in such a case if the composition is secured (*c*).

Unreasonable compositions.

No hard and fast rule as to amount.

The essence of a composition is that the creditors who take part in it act upon the faith and understanding that they come in upon terms of equality and if there is any private agreement or secret bargain with any one creditor the composition is void (*d*). The principle applies even if the additional payment is to be made at the expense of a third person with the debtor's knowledge (*e*). Such an agreement is void and cannot be enforced by the person preferred (*f*), but if the preference is communicated

Unequal compositions and secret bargains.

*Russell, re Robins*, 22 C.D., 778; *In re and ex parte Terrell*, 4 C.D., 293; *Ex parte and re Williams*, 18 C.D., 495, in which *Ex parte Elworthy*, 20 L.R. Eq., 742, was not followed; and *vide Ex parte Cocks, re Poole*, 21 C.D., 397.

(*u*) S. 73 (5), Act of 1897.

(*v*) S. 73 (13), Act of 1897.

(*w*) S. 73 (5), *ante*.

(*x*) *In re Postlethwaite, ex parte Ledger*, 3 Morrell, 169.

(*y*) *Vide Ex parte and re Page*, 2 C.D., 323; *Ex parte and re Terrell*, 4 C.D., 293; *Ex parte Russell, re Robins*, 22 C.D., 778; *Ex parte Ball, re Parnell*, 20 C.D., 670; *Ex parte Staff*, 20 L.R.,

Eq., 775; *Ex parte Williams*, 18 C.D., 495.

(*z*) *Ex parte Cobb, re Sedley*, L.R., 8, Ch., 727.

(*a*) *Vide Ex parte Hudson, re Walton*, 22 C.D., 773, and *Ex parte and re Hope*, 9 C.D., 393.

(*b*) *Ex parte and re Terrell*, 4 C.D., 293.

(*c*) *Ex parte Hudson, re Walton, ante*.

(*d*) *Ex parte and re Milner*, 15 Q.B.D., 605; *Ex parte and in re Baum*, 7 C.D., 719.

(*e*) *Ex parte and re Milner, ante*.

(*f*) *Vide Blacklock v. Dobie*, 1 C.P.D., 265.

**CHAP. IX.** to the other creditors as part of the transaction and they do not object, it has been held valid (*g*).

Appeal from Court's decision.

The decision of the Court in approving or refusing to approve the composition can be appealed from if the Court has not proceeded on right principles (*h*), and the decision will be reversed if the discretion of the Court has been exercised wrongly (*i*). The decision in such a case to support the appeal should be shown to be manifestly wrong (*k*).

Registration conclusive evidence in certain cases.

Registration in the absence of fraud is conclusive evidence that the resolution was duly passed and that all the requisitions of the Acts in respect of such were complied with (*l*).

Further extraordinary resolution and registration thereof.

The creditors may, by an extraordinary resolution, add to or vary the provisions of any composition previously accepted by them without prejudice to any persons taking interests under such provisions, who do not assent to such additions or variations (*m*). The word "persons" referred to does not include creditors (*n*), and therefore those who dissent to an alteration reducing the amount of the composition, if carried, are bound (*o*). Any such resolution can be presented to the chief clerk in the same manner and with the same consequences as the extraordinary resolution by which the composition was accepted in the first instance (*p*).

Effect on creditors of composition.

The provisions of a composition are binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced to the meetings at which the resolution was passed, but it does not affect or prejudice the rights of any other creditors (*q*). A creditor who is omitted from the statement is therefore not bound, but he may nevertheless take advantage of it, and by proving his debt claim a share in the fund (*r*); but he cannot come in to dispute its validity (*s*). If the resolutions are simple and regis-

(*g*) *Jackman v. Mitchell*, 9 R.R., at p. 233; 13 Ves., at p. 587.

(*h*) *Vide In re Staniar, ex parte Smith*, 20 Q.B.D., at p. 547.

(*i*) *In re and ex parte Reed*, 3 Morrell, 90; 17 Q.B.D., 244.

(*k*) *In re Postlethwaite, ex parte Ledger*, 3 Morrell, 169.

(*l*) S. 155, Act of 1890; s. 1, Act of 1897.

(*m*) S. 154, Act of 1890.

(*n*) *Ex parte Radcliffe Investment*

*Company, re Glover*, 17 L.R., Eq., 121.

(*o*) *Ibid.*

(*p*) S. 154, *ante*.

(*q*) S. 154, Act of 1890; s. 1, Act of 1897.

(*r*) *Ex parte Carew*, 10 L.R. Ch., 308; *Breslauer v. Brown*, 3 App. Cas., 672; *vide In re Fink*, 20 V.L.R., at p. 226.

(*s*) *In re Fink*, 20 V.L.R., at p. 227; *vide Melhado v. Watson*, 2 C.P.D., 281.



tered no trustee being appointed for the receipt and distribution and no security given, the proceedings are at an end and the omitted creditor cannot be admitted (*t*). An omitted creditor may still be bound if he has attended the meetings and voted on the resolutions passed (*u*). The holder of bills negotiated who has received no notice of the meeting is not bound though the acceptor has entered on the statement the drawer as a creditor without specifying that the debt is due on bills, and though he does not not know they have been negotiated (*v*). Where the names of the drawers of bills were inserted as creditors, the bills being held by a bank, but after the date of the petition the bills were indorsed to a firm consisting of the drawers and another person, the drawers were bound (*w*). Persons who are entered in the statement as creditors claiming to hold security with a note added that their claim is being resisted are not bound (*x*). Up to the registration of the resolution a non-assenting creditor can levy an execution and obtain a valid security on the debtor's goods if no equity can be raised against him by reason of his personal conduct (*y*). The resolution is not retrospective in its effect so as to invalidate securities obtained by a creditor in the interval between the filing of the petition and the first meeting (*z*). Where a debt is set down in the statement as due to one person, whereas in fact it is due to another, who proves for it and attends and votes against the resolution, the latter is not bound, since the debtor in such a case has failed to comply with the requirements of the section (*a*), and the particulars as to the debt, names, and addresses must be correctly stated (*b*). If the amount of the creditor's debt is incorrectly stated it is too late to apply to the Court to fix the amount of the debt after registration of the resolution (*c*).

When the composition is payable at a future time, or in instal-

(*t*) *Ex parte and re Lacey*, 16 C.D., 131, distinguishing and explaining *Ex parte and re Carew*, ante, and explaining *Breslawer v. Brown*, ante.

(*u*) *Campbell v. Im Thurn*, 1 C.P.D., 267.

(*v*) *Ex parte Mathewes, re Angel*, 10 L.R. Ch., 304.

(*w*) *Forwood v. Walker*, 36 L.T. N.S., 21.

(*x*) *Melhado v. Watson*, 2 C.P.D., 281.

(*y*) *Ex parte McLaren, re McColla*, 16 C.D., 534.

(*z*) *Ex parte and re Jones*, 10 L.R. Ch., 663.

(*a*) *Oppenheim v. Jackson*, 49 L.J. C.P., 216; and vide *Ex parte Laing*, 5 C.D., 971.

(*b*) Vide s. 154, ante, and *Burliner v. Royle*, 5 C.P.D., 354, and *Ex parte Paper Staining Company re Bishop*, 8 L.R. Ch., 595; *McDonald v. Chesney*, 50 L.J. Q.B., 87.

(*c*) *Re Fink*, 20 V.L.R., 223. In this case it was stated that the only dispute which the Court can settle in a case of such sort is a dispute as to the value of a security held by an assenting creditor; *ibid*, at p. 228.

CHAP. IX. ments, the creditor is barred from suing on the original debt until default (*d*). A creditor with notice of a resolution having been duly passed, proceeded to sequester the estate, and the resolution having been duly registered before the return of the order *nisi*, the order was discharged (*e*). The general principle *qui prior est tempore potior est jure* is applicable, and therefore where the creditor obtains his order *nisi* prior to the passing of the resolution it can be made absolute (*f*).

As to default of payment of same.

When default is made in any payment of an approved composition either by the debtor or trustee, r. 445 provides that no action to enforce such payment shall lie, but the remedy of any person aggrieved shall be by application to the Court. The application apparently intended here is that under s. 73 (9), Act of 1897. R. 445 is a replica of r. 33, *Bankruptcy Rules* 1890, made under the English Act of 1890, which Act contains a similar provision (*g*) to the Victorian section (*h*). There is also in force here that part of s. 154, Act of 1890 (*i*), giving power to the Court to sequester the property of the debtor if the composition cannot proceed as therein set out, and providing that "proceedings may be had accordingly." Under such last section mentioned, it has been held by the English Courts that where the composition failed by default of the debtor a creditor could sue for the original debt or prove in the debtor's bankruptcy (*j*). The debtor is not liable for the default of the trustee in not paying the composition (*k*), and where the money sufficient to pay the composition has been handed to him, his non-payment cannot defeat it (*l*), and where the debtor's solicitor constituted himself a trustee for the creditors and received the money to be paid in composition, it was held he could not withhold it by way of lien for his costs thereon (*m*). Under the Act of 1869, it was held that the Court had no power to enforce a covenant by a surety for payment of the composition,

Default by the trustee.

Default by surety.

(*d*) *Vide Slater v. Jones, Capes v. Ball*, 8 L.R. Exch., 186; *vide infra* as to default of payment.

(*e*) *In re White*, 2 V.R. (I.), 42; 2 A.J.R., 132.

(*f*) *In re Marie*, 3 A.J.R., 6.

(*g*) S. 3 (15).

(*h*) S. 73 (9).

(*i*) Adapted from the *Bankruptcy Act* 1869, repealed.

(*j*) *Ex parte Gilbey, re Bedell*, 8 C.D., 248; *Edwards v. Coombe*, L.R.,

7 C.P., 519; *Re Hatton, ex parte Hodge*, L.R. 7 Ch., 723; *Goldney v. Lording*, L.R. 8 Q.B., 182; *Edwards v. Haucher*, 1 C.P.D., 111; *Newell v. Van Praagh*, L.R. 9 C.P., 96; *Ex parte Masters, re Winson*, 33 L.T. N.S., 613.

(*k*) *Ex parte Waterer, re Taylor*, 43 L.T., Bky., 25.

(*l*) *Campbell v. Im Thurn*, 1 C.P.D., 267.

(*m*) *Ex parte Clark, re Newland*, 4 C.D., 515.

it being the duty of the trustee to sue the surety on his covenant (n). CHAP. IX.

No creditor can enforce payment of any part of the sums payable under a composition unless and until he has proved his debt (o), and every creditor who has not proved his debt before the approval of the composition must lodge his proof with the chief clerk (p). Composition not payable until debt proved.  
Lodging of proof after approval.

A form of notice to creditors who have not proved of intention to pay composition is given in form 174, *post*. Form of notice by trustee.

Any person who under the Acts would not be released by a certificate of discharge if the estate of the debtor had been sequestrated in insolvency is not released by the acceptance of a creditor of a composition (q). Certain rights not prejudiced.

All the provisions of the Acts with regard to the administration and distribution of the debtor's property, and the duties, obligations, powers and rights of the trustee, so far as the nature of the case and the terms of the composition admit, apply to compositions as in the case of insolvency and as if the trustee were the trustee in insolvency (r), and after the presentation to the chief clerk of any extraordinary resolution the Court has the same powers, authority and jurisdiction to examine or to direct the examination of any person whomsoever, as it has in the case of insolvency (s). The provisions of a composition may be enforced by the Court on application by any person interested, and any disobedience of an order of the Court is deemed a contempt of court (t). The form of application for enforcement is No. 175, *post*. The affidavit in support is No. 176 and the order No. 177, *post*. Application of general provisions of the Acts.  
Examinations.  
Enforcement of provisions of composition.  
Form as to enforcement.

The Court has power to annul the composition under the circumstances set out in s. 73 (9), Act of 1897, without prejudice to the validity of any sale, disposition or payment duly made or thing duly done under or in pursuance of the composition, and it may sequestrate the property of the debtor under the circum- Power to annul the composition and sequestrate debtor's property.

(n) *Ex parte Mirabita, re Dale*, L.R., 20 Eq., 772.  
(o) R. 446.  
(p) *Ibid*.

(q) S. 73 (14), Act of 1897.  
(r) *Ibid* (12).  
(s) *Ibid* (11).  
(t) *Ibid* (8); *vide* s. 154, Act of 1890.

**CHAP. IX.** stances set out in s. 154, Act of 1890. The Court will exercise this discretionary power if there is even a probability that the creditors will gain by an adjudication, but it will not do so if it can see that the creditors will gain nothing by the sequestration (*u*). Fraud taints the proceedings, and where the resolution has been carried by the vote of a creditor who has purchased the debt in respect of which he votes with the object of voting, the whole of the proceedings are tainted and the estate can be sequestrated by a duly qualified creditor (*v*). The Court can exercise its power of sequestration even though no liquidation or composition resolution has been passed by the creditors (*w*). The creditor moving should not fail to show that there are "legal difficulties," or that the creditors are prejudiced (*x*). The power given to the Court is a discretionary one and it may be exercised more than six months after the filing of the liquidation petition, and it is independent of the commission by the debtor of an act of insolvency (*y*). A declaration by the debtor of his inability to pay one of the instalments at the time appointed is a sufficient ground (*z*), and where property was accepted as a security for the composition, but its value was exaggerated and it did not realise sufficient to pay the composition, it was held that the matter could not "proceed without injustice" to the creditors and the order was made (*a*). Apparently no petition is necessary, and the Court may sequester the estate on motion (*b*).

Effect of  
annulment on  
surety.

The annulment discharges a surety for payment as the order makes it impossible to carry out the composition in any way (*c*).

Proceedings  
public.

Every resolution and statement presented to the chief clerk is open for public inspection on payment of the prescribed fee, and all applications to the Court and the hearing thereof must be in open Court (*d*).

Meaning of  
"creditor" in  
composition.

Every person who would be entitled to prove in insolvency is deemed a creditor within the meaning of s. 154, Act of 1890, and

(*u*) *Re Moon*, 19 Q.B.D., 669.

(*v*) *Ex parte Fore Street Warehouse Company, re Burra*, 30 L.T.N.S., 624.

(*w*) *Ex parte Walker, in re McHenry*, 22 C.D., 813.

(*x*) *Ex parte and re Shiers*, 7 C.D., 416; *vide also Ex parte and re McHenry*, 24 C.D., at p. 45.

(*y*) *Ex parte and re Charlton*, 6 C.D.,

45.

(*z*) *Ibid*.

(*a*) *Re Moon*, 19 Q.B.D., 669; 4 Morrell, 263.

(*b*) *Vide Sharp v. McHenry*, 38 C.D., 427.

(*c*) *Walton v. Cook*, 40 C.D., 325, 330.

(*d*) S. 73 (15), Act of 1897; s. 3, *ibid*; r. 6.

s. 73, Act of 1897 (e). In case there be any dispute as to the right of any person to be deemed a creditor, or as to the amount of his debt or the value of his security, the Court settles the same (f). It has been held that the word "creditor" in s. 154 and in r. 419 means a person who is a creditor at the date of the composition proceedings (g).

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The debtor is guilty of a misdemeanour, and may be imprisoned for any term not exceeding three years, with or without hard labour, if he make at any meeting, under Part X., Act of 1890, any false statement or any material omission in any statement relating to his affairs, or if he be guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to any agreement with reference to his affairs or such composition (h); and the debtor remains liable for the unpaid balance of any debt which he incurred or increased, or whereof before the date of the composition he obtained forbearance by any fraud, if the defrauded creditor has not assented to the composition otherwise than by proving his debt and accepting dividends (i).

Punishment for fraud by debtor in composition.

Continued liability for certain debts incurred by fraud.

The debtor is not discharged in composition until the amount of composition has been fully paid (k). To be discharged from liability for debts included in the statement the debtor must pay or tender unconditionally to the creditors the composition payable upon the admitted debt, giving the creditor the opportunity of accepting or rejecting it (l).

Discharge of debtor in composition.

(e) S. 73 (10), Act of 1897.

(f) *Ibid.*

(g) *In re Cromie*, 20 V.L.R., 124.

(h) S. 158, Act of 1890.

(i) S. 161, Act of 1890—compare s.

15, *Debtors Act* 1869.

(k) *Ex parte Barrow*, in *re Andrews*,

18 C.D., 484.

(l) *Vide Tea Company v. Jones*, 43 L.T., 255.

## CHAPTER X.

### DEEDS OF ARRANGEMENT.

UNDER this heading Part VI. of the Act of 1897 deals with the registration of deeds of arrangement, the functions, powers, rights, duties, obligations and liabilities of the trustee, creditors and debtors under such deeds, unclaimed dividends, and the application of certain provisions of the insolvency law.

Part VI., Act of  
1897.

Part VI. of such Act applies to every deed of arrangement as hereinafter defined made after the commencement of such Act, that is a deed of arrangement includes any of the following instruments whether under seal or not, made for or in respect of the affairs of a debtor for the benefit of his creditors generally, that is to say:—(A) An assignment of property; (B) a deed of agreement for a composition and—in cases where creditors of a debtor obtain any control over his property or business—(C) a deed of inspectorship entered into for the purpose of carrying on or winding up a business; (D) a letter of licence authorising a debtor or any other person to manage, carry on, realize or dispose of the business with a view to the payment of debts; and (E) any agreement or instrument entered into for the purpose of carrying on or winding up of a debtor's business or authorising a debtor or any other person to manage, carry on, realize or dispose of a debtor's business with a view to the payment of his debts (a).

Provisions of  
Insolvency Acts,  
how far  
applicable.

The provisions of the Insolvency Acts as to the payment of certain claims as preferential, and as to the proof of debts, and as to the respective rights of secured and unsecured creditors, and as to the examination of the debtor or any other person applies to every deed of arrangement duly registered (b), and nothing contained

(a) S. 74, Act of 1897.

(b) S. 79, *ibid.*

in Part VI. of the Act of 1897 must be construed to repeal or affect any provision of the law for the time being in force with regard to deeds of arrangement in relation to insolvency or to give validity to any deed or instrument which by law is an act of insolvency, or void or voidable (*c*). The registration does not prevent the deed from being an act of insolvency if it can be taken advantage of as such (*d*).

CHAP. X.

Saving as to insolvency law.

Nothing in Part VI., Act of 1897, applies to any agreement for composition within s. 131, Act of 1890, or any liquidation by arrangement, or any composition under ss. 153 and 154 respectively of the same Act (*e*).

The expression "creditors generally" includes all creditors who may assent to or take the benefit of a deed of arrangement, and whether or not the deed provides that any of such creditors shall have any preference or priority as regards any other creditors, and whether or not the trustee (if any) of the deed or any other person shall have any discretion as to giving any creditor a preference or priority or any advantage as regards any other creditor (*f*), and "for the benefit of creditors" means for the benefit of all the creditors (*g*).

Meaning of "creditors generally."

The first class of deed dealt with is that of an assignment of property (*h*). Subject to the effect of registration an assignment until communicated to the creditors and the relation of trustee and *cestui qui trust* created is revocable by the debtor (*i*), but a conveyance upon trust executed by a person to repair breaches of trust committed by him in connection with certain scheduled trust estates constitutes a valid trust, and such a deed is not a mere revocable mandate (*k*). Those creditors who assent to the

The classes of deeds dealt with.

(A) An assignment of property.

(*c*) S. 81, *ibid*—compare *Deeds of Arrangement Act 1887*, s. 17; *vide* s. 115, Act of 1897, as to trustees.

(*d*) *In re Batten*, *ex parte Milne*, 22 Q.B.D., at p. 693.

(*e*) S. 74, Act of 1897.

(*f*) S. 82, Act of 1897; *vide ante*, at p. 106.

(*g*) *Beeston v. Donaldson*, 18 V.L.R., at p. 213.

(*h*) The meaning of the word property is not defined in Part VI. of the Act, but there is no doubt that the word "priority" in the interpretation clause, s. 82, as follows—"Priority has the

"same meaning as the same expression "has in the principal Act"—is intended for the word "property," *vide* s. 19, *Deeds of Arrangement Act 1887*. The Act of 1897 is however read and construed as one with the Act of 1890 (s. 1, Act of 1897).

(*i*) *Johns v. James*, 3 C.D., 744; *vide* also *Walwyn v. Coutts*, 3 Mer., 707; *Acton v. Woodgate*, 2 Myl. & K., 492; *Garrard v. Lauderdale*, 2 Russ & My., 451.

(*k*) *New's Trustee v. Hunting*, 4 Manson, 103.

**CHAP. X.** deed, and to whom it is communicated, are bound by it (*l*). A creditor need not be named as a party, nor execute the deed to be entitled to the benefit of it if he assents to it (*m*), but a creditor cannot claim antagonistically to the deed, and after his failure be entitled to the benefit of it, though he seeks to do so before the estate is distributed (*n*). Good faith is necessary as between the parties (*o*), and if the deed is of such a nature as to be fraudulent against creditors within 13 Eliz. c. 5, it may be set aside if the right to sue is not barred by the *Statute of Limitations* (*p*).

(*p*) A deed of agreement for a composition.

In practice a composition is either payable immediately or at a future time. In the latter case it is usual to have the amounts guaranteed by a third party, or the debtor is required to make an assignment of his property to a trustee to secure the payment of the composition. Unless it is specifically agreed that any creditor shall have any preference or priority as regards any other creditors the essence of a composition arrangement is equality between the creditors, and therefore a secret bargain cannot be made with the debtor or some other person for an additional payment or security as an inducement for the creditor to become a party to the deed. In such a case the secret agreement is void, and any of the creditors may repudiate (*q*). The principle applies even if the additional payment is made at the expense of a third person if it is made with the debtor's knowledge, and whether the composition is made under the provisions of a Statute or not (*r*). The consideration to each creditor is the forbearance of the others to sue for the amounts of their debts, and where it is *bond fide* every creditor who assents is bound (*s*); but where the creditor has been induced to assent by the misrepresentation that others have assented or will assent he is not bound (*t*). The assent of a creditor can be given without execution of the deed or agreement by him, as by accepting payment or security or acting in

(*l*) *Vide Ex parte Jerrard, re Chambers*, 3 Mont. & A., 358; *Johns v. James, ante*.

(*m*) *In re Babers Trust*, L.R., 10; Eq., 554; *vide Ex parte Sadler and Jackson*, 15 Ves., 52; 10 R.R., 18; *Biron v. Mount*, 24 Beav., 642.

(*n*) *In re Meredith, Meredith v. Facey*, 29 C.D., 745.

(*o*) *Vide Cockshott v. Bennett*, 2 T.R., 763; 1 R.R., p. 617; *Re Lenzberg's Policy*, 7 C.D., 650; *Ex parte and re Milner*, 15 Q.B.D., 605; *Blacklock v.*

*Dobie*, 1 C.P.D., 265.

(*p*) *Vide In re Maddever, Three Towns Bank v. Maddever*, 27 C.D., 523.

(*q*) *Ex parte Sadler and Jackson*, 15 Ves., 52; 10 R.R., 18; *Re Lenzberg's Policy*, 7 C.D., 650; *Ex parte and re Milner*, 15 Q.B.D., 605.

(*r*) *Ex parte and re Milner, ante*.

(*s*) *Norman v. Thompson*, 4 Exch., 755.

(*t*) *Cooling v. Noyes*, 6 T.R., 263; and *vide Lewis v. Jones*, 4 B. & C., 506.



such a manner as to induce other creditors or the debtor to assent (*u*). CHAP. X.

The other classes of deeds are those where creditors of a debtor obtain any control over his property or business—(c) A deed of inspectorship entered into for the purpose of carrying on or winding up a business; (D) a letter of licence authorising a debtor or any other person to manage, carry on, realise or dispose of the business with a view to the payment of debts; and (E) any agreement or instrument entered into for the purpose of carrying on or winding up of a debtor's business or authorising a debtor or any other person to manage, carry on, realise or dispose of a debtor's business with a view to the payment of his debts (*v*). These agreements are those by which the creditors allow the debtor either to manage, carry on, or wind up his business under the control of one or more inspectors in order to make provision for the payment of his debts without an assignment of the property, the debtor covenanting that he will if and when required by the inspectors convey his estate or property to them for realisation and distribution amongst the creditors; or where the debtor conveys his estate to trustees upon trust to allow him to carry on the business and realise the estate with a view to the liquidation of the debts, but under the control and inspectorship of the trustees, reserving the power to the trustees to take possession of and realise the estate for the distribution of the proceeds amongst the creditors.

From and after the commencement of the Act of 1897 a deed of arrangement, to which Part VI. thereof applies, is inoperative and has not any validity at law or in equity unless the same has been registered under the Act within ten clear days after the first execution thereof by the debtor or any creditor, or if it is executed in any place out of Victoria, then within ten clear days after the time at which it would in the ordinary course of post arrive in Victoria if posted within one week after the execution thereof (*w*). When the time for registering expires on a Sunday or other day on which the office of the Registrar-General is closed

(*u*) *Ex parte Sadler and Jackson*, ante; *Biron v. Mount*, 24 Beav., 642; *In re and ex parte Woodroff*, 4 Manson, 46.

(*v*) S. 74, Act of 1897.

(*w*) S. 75, Act of 1897—compare *Deeds of Arrangement Act 1887*, s. 5.

(c) Deeds of inspectorship.

(D) Letters of licence.

(E) Agreement for carrying on or winding up.

Avoidance of unregistered deeds of arrangement.

CHAP. X. the registration is valid if made on the next following day on which the office is open (x).

Mode of registration.

The mode of registration is as follows :—The deed and every schedule or inventory thereto annexed or therein referred to, or a true copy thereof respectively, and of every attestation of the execution thereof must be filed in the office of the Registrar-General within the time aforesaid together with an affidavit verifying the time of execution by the debtor, and containing a description of the residence and occupation of the debtor and of the place or places where his business is carried on, and the title of the firm or firms under which the debtor carries on business, and an affidavit by the debtor stating the total estimated amount of property and liabilities included in the deed, the total amount of the composition (if any) payable thereunder, the name, occupation and address of the trustee (if any), and the names and addresses of his creditors. A deed of arrangement registered as required by the provisions of s. 75, Act of 1897, is deemed to be registered or filed in accordance with the provisions of Part VI. of the *Instruments Act* 1890, and of the *Book Debts Act* 1896 (y).

The affidavits to be filed pursuant to the Act respectively are in the forms 1, 2 and 3 in the Appendix to the rules under Parts VI. and VIII., of the Act of 1897, *post*, with such variations as circumstances may require (z), and upon every copy of a deed which is presented for filing, there must be indorsed by the person who presents it, the name of the debtor, the date of the deed stating the number of folios (a), which the deed contains (b), and where a deed is registered under the Act there must be written thereon a certificate stating that it has been duly registered as prescribed by the Act and the date of such registration. Such certificate must be signed by the registrar (c).

Execution of deed by all creditors not necessary for registration.

The fact that all the creditors have not executed the deed prior to registration does not avoid the deed or vitiate the registration (d). The provisions of the Act are sufficiently complied with by the registration of the deed as it existed at the time of regis-

(x) S. 86, Act of 1897—compare *Deeds of Arrangement Act* 1887, s. 10.

(y) S. 76, *ibid.*

(z) R. 3, Rules under Parts VI. and VIII. of the Act of 1897.

(a) Of 72 words each.

(b) R. 5, Rules under Parts VI. and VIII., Act of 1897.

(c) R. 6, *ibid.*

(d) *In re Batten, ex parte Maim*, 22 Q.B.D., 685; 6 Morrell, 110.

tration (e). In the case referred to only one creditor had executed the deed at time of registration the other creditors executing it subsequently. CHAP. X.

The terms "residence" and "business" have no actual definite technical meaning, and they are to be construed in every case in accordance with the object and intent of the Act in which they occur (f). The terms "residence" and "business."

The term "occupation" has been held to mean the trade or calling by which a man ordinarily seeks to get his living or the business in which a man is usually engaged to the knowledge of his neighbours (g). "Occupation."

No deed of arrangement is deemed insufficient or invalid by reason only that in such deed or any schedule or inventory or copy thereof respectively or any affidavit there is an omission or incorrect or insufficient description or misdescription in respect of any of the particulars required by law to be contained therein if the Court, judge or justice before whom the validity of such deed comes into question, be satisfied that such omission or incorrect or insufficient description or misdescription was accidental or due to inadvertence, or to some cause beyond the control of the debtor and not imputable to any negligence on his part (h). Immaterial errors not to invalidate deed.

The Registrar-General must keep a register wherein is entered as soon as conveniently may be after the presentation of a deed for registration an abstract of the contents of every deed of arrangement registered under the Act, containing the following and any other prescribed particulars:— Form of register.

(A) The date of the deed. .

(B) The name, address and description of the debtor, and the place or places where his business is carried on, and the title of the firm or firms under which the debtor carries on business, and the name and address of the trustee (if any) under the deed.

(e) *Ibid.*

(f) *Ex parte Breull, in re Bowie*, 16 C.D., at p. 487; *vide re Fisher*, 14 V.L.R., 693.

(g) *Vide Ex parte National Mercantile*

*Bank, in re Haynes*, 15 C.D., at p. 54.

(h) S. 80, Act of 1897—compare *Deeds of Arrangement Act 1887*, s. 9; and *Book Debts Act 1896*, s. 13.

CHAP. X.

- (C) A short statement of the nature and effect of the deed, and of the composition in the pound payable thereunder.
- (D) The date of registration.
- (E) The amount of property and liabilities included under the deed as estimated by the debtor (*i*).

The abstract of any deed to be entered on the register must be in the form in the Appendix to rules made under Parts VI. and VIII. of the Act of 1897, *post*, with such variations as circumstances may require (*k*).

Office copies  
admitted as  
*prima facie*  
evidence.

Subject to the provisions of the Act of 1897, any person is entitled to have an office copy of or extract from any deed registered under the Act upon paying for the same at the rate mentioned in the second schedule to the Act, *post*, and any copy or extract purporting to be an office copy or extract is in all Courts and before all judges, justices, arbitrators or other persons admitted as *prima facie* evidence thereof, and of the effect and date of registration of the deed as shown thereon (*l*), and any person is entitled at all reasonable times to search the register upon paying the fee specified in the second schedule referred to, and is entitled at all reasonable times to inspect and examine and make extracts from any registered deed of arrangement without being required to make a written application, or to specify any particulars in reference thereto upon payment of the said fee for each deed of arrangement inspected. The extracts are limited to the dates of execution and of registration, the names, addresses and descriptions of the debtor and of the parties to the deed, a short statement of the nature and effect of the deed, and any other prescribed particulars (*m*).

Inspection of  
register and  
registration  
of deeds.

Local registra-  
tion of deeds.

When the place of business or residence of the debtor who is one of the parties to the deed of arrangement or who is referred to therein is situate in some place more than twenty miles from the General Post Office, Melbourne, the Registrar-General must, after three clear days after registration, and in accordance with any directions that may be prescribed, transmit a copy of such deed to the Registrar of the County Court in or near the place

(*i*) S. 77, Act of 1897.

(*k*) R. 4, Rules made under Parts VI.  
and VIII. of the Act of 1897.

(*l*) S. 87, Act of 1897.

(*m*) S. 88, *ibid*.

where such place of business or residence is situate. Every copy so transmitted must be filed, kept, and indexed by the Registrar of the County Court in the prescribed manner, and any person may search, inspect, make extracts from and obtain copies of the registered copy in the like manner and upon the like terms as to payment or otherwise as near as may be as in the case of deeds registered under the Act. The Registrar-General must also forthwith notify the chief clerk in Melbourne of the registration of every deed of arrangement (*n*). Upon every copy of such deed thereof which is transmitted to a County Court Registrar there must be written copies of every indorsement or certificate written on the original deed or on the filed copy thereof. Such copies must be signed by the Registrar (*o*). The copy of a deed may be transmitted to the County Court Registrar by post (*p*). The County Court Registrar must number the copies of deeds received by him in the order in which they are respectively received, and must file and keep such copies in his office (*q*); and the County Court Registrar must keep an index, alphabetically arranged, in which he must enter under the first letter of the surname of the debtor such surname with his other names, address and description, and the number which has been affixed to the copy (*r*). The County Court Registrar must allow any person to search the index kept by him at any time during office hours, and make extracts upon payment of the same fee as is payable for the time being in the office of the Registrar. The County Court Registrar must also, if required, cause any office copy to be made of any copy of a deed filed in his office, and is entitled for making and sealing to the same fee as is payable for the time being for an office copy of a deed or instrument in the office of the Registrar (*s*). The extracts referred to are limited to the date of execution and registration, the names, addresses and descriptions of the debtor and the parties to the instrument, and a short statement of the nature and effect thereof (*t*).

There must be taken in respect of the registration of deeds of arrangement and in respect of any office copies or extracts, or searches made by or at the office of the Registrar-General, the

(*n*) S. 89, *ibid*.  
 (*o*) R. 7, Rules under Parts VI. and VIII. of Act of 1897.  
 (*p*) R. 8, *ibid*.

(*q*) R. 9, *ibid*.  
 (*r*) R. 10, *ibid*.  
 (*s*) R. 12, *ibid*.  
 (*t*) R. 11, *ibid*.

**CHAP. X.** fees set forth in the second schedule to the Act of 1897, and nothing in such Act contained makes it obligatory on the Registrar-General to do or permit to be done any act in respect of which any fee is specified, except on payment of such fee (*u*). The scale is as follows:—

Scale of fees.	(1.) On every certificate indorsed on an original deed and the registration thereof .. ...	0 1 0
	(2.) On searching register (for every name inspected, and on inspecting the filed copy including the limited extract to be taken pursuant to the Act) ... ..	0 1 0
	(3.) On office copies and extracts of or from the filed copy of a deed for every folio of seventy-two words or fractional part of a folio	0 0 3
	(4.) On examining a copy brought in to be marked as an office copy for every folio or fractional part of a folio ( <i>v</i> ) ... ..	0 0 2

Power to make rules under Part VI.

It is and may be lawful for the judges of the Supreme Court or any two of them, of whom the Chief Justice must be one, to make such rules as they may think fit for regulating proceedings under Part VI. of the Act of 1897 (*w*).

The trustee.

The trustee of a deed of arrangement is deemed to be an officer of the Court of Insolvency, and no person can be appointed or act as such trustee unless he is registered as qualified to be appointed to the office of trustee under the Insolvency Acts, or if not so registered unless he is one of the creditors or a person appointed by an ordinary resolution of the creditors, and before he acts under the deed he must give security in manner in Part II. of the Act of 1897 provided, with regard to a trustee in insolvency, and so far as the nature of the case will admit the trustee, creditors and debtor respectively have the same functions, powers, rights, duties, obligations and liabilities and the Court has the same powers, authority and jurisdiction as in the case of insolvency (*x*).

Functions, &c., of trustee, creditors and debtors.

Powers of Court.

Further incidents as to trustee.

In Part VI. of the Act of 1897 "trustee" also includes every person having under a deed of arrangement the power, right, or duty to pay dividends to the persons entitled thereto, and "dividend" also includes all moneys which under the deed of

(*u*) S. 90 (1), Act of 1897.

(*v*) 2nd Schedule, Act of 1897.

(*w*) S. 90 (2), Act of 1897. The rules made under this provision are those cited as "the rules under Parts VI.

"and VIII. of the *Insolvency Act 1897*," Appendix, *post*.

(*x*) S. 83 (1), Act of 1897; *vide also* s. 115, as to the application of the Acts to the trustee.

arrangement are payable by the trustee to the persons entitled thereto. Where a person not registered as aforesaid is appointed a trustee pursuant to such provision he must not act as trustee until a copy of such resolution has been filed by the chief clerk and such person has given security as aforesaid (*y*). A trustee under a deed of arrangement by accepting the office accepts it with the statutory incidents, and he must therefore pay for the stamps, on filing the accounts, out of his own pocket if there are no assets (*z*). The trustee under a deed has apparently the same right to disclaim onerous property as a trustee in insolvency (*a*), and he may in addition, as he could prior to the Act, relieve himself of the liability of a leasehold by transferring to a pauper (*b*).

The official accountant takes cognizance of all matters relating to the appointment, security and conduct of trustees within the meaning of Part VI., Act of 1897, and his duty is to immediately report in writing to the Court whenever there appears to be any contravention of the provisions of the Insolvency Acts in relation thereto (*c*).

The trustee of a deed of arrangement must not, except in the ordinary course of the business (if any) theretofore carried on by the debtor, sell, pledge, or in any way dispose of or encumber any of the property included in or under the deed until after ten days from the registration thereof as required by the Act. A trustee wilfully contravening this provision, and every person wilfully party to such contravention, is personally liable to make good to the estate any loss occasioned by such contravention. These provisions do not apply to any case where the Court upon application in that behalf is satisfied that it is expedient before the expiration of the said period of ten days from registration to effect any sale, pledge, disposition, or incumbrance, and directs that the trustee be at liberty to effect the same; but nothing in the foregoing provision contained in any way prejudices or affects any person dealing in good faith with the trustee (*d*).

In the case of any deed of arrangement made before the com-

(*y*) S. 83 (2 and 3), Act of 1897.

(*z*) *Re Hertage*, 3 Manson, 297.

(*a*) *Vide* Chapter V., at p. 210 *et seq.*

(*b*) *Vide Stevenson v. Brind*, 16 A.L.T.,

166. *Vide Hopkinson v. Lovering*, 11 Q.B.D., 92.

(*c*) S. 67, Act of 1897.

(*d*) S. 78, *ibid.*

Cognizance by official accountant

Trustee not to encumber property until certain time.

Unclaimed dividends in respect of past deeds of arrangement.

**CHAP. X.** mencement of the Act of 1897 (*e*), all dividends in the hands of the trustee of the deed which have not been claimed by the parties entitled thereto for the space of twelve months next after the same have been or shall be payable must, unless the Court otherwise orders, be paid by the trustee into the "Insolvency Unclaimed Dividend Fund" to be dealt with as to principal and interest as provided in s. 127 of the Act of 1890 (*f*). "Deed of arrangement" in such provision includes any deed, instrument or writing which if made after the commencement of the Act of 1897 would be deemed to be a deed of arrangement within the meaning of Part VI. of the said Act (*g*).

Debtor to  
furnish state-  
ment of affairs  
when required.  
Contempt of  
Court.

At any time within three years after a debtor has made a deed of arrangement the Court may require such debtor to make a statement verified by affidavit giving particulars of all his assets and liabilities and property whatsoever, and if he, without reasonable cause, fails to do so, he is guilty of contempt of Court (*h*).

(*e*) 1st January, 1898.

(*f*) S. 85 (1), Act of 1897.

(*g*) *Ibid* (2).

(*h*) S. 84, *ibid*.



## CHAPTER XI.

### OFFENCES AGAINST THE INSOLVENCY LAW (a).

UNDER this heading Part XI., Act of 1890, deals with offences against the Insolvency Law. In addition to the offences contemplated by Part XI., s. 129, Part VI. contemplates the arrest of the insolvent and his retention in custody until such time as the Court may order under certain circumstances (b), and ss. 140 and 141, Part VIII. of the Act of 1890, deal with offences that the insolvent may be imprisoned for, in connection with the refusal or suspension of the certificate of discharge, and s. 153 (2), Act of 1890, provides that any person wilfully making a false declaration in relation to his statutory declaration of debt, is guilty of a misdemeanour. By s. 25, Act of 1897, any assignee or trustee contravening the provisions of such section and every person who is a party to such contravention is guilty of a misdemeanour (c), and by s. 55, Act of 1897, any contravention by an assignee or trustee of such section is also a misdemeanour (d).

S. 156, Act of 1890, provides that as to persons other than the insolvent, the following provisions shall be made (e):—

Offences under  
Part XI., Act  
of 1890.

(I.) Any person who shall wilfully conceal any real or personal estate of an insolvent with intent to defraud his creditors shall be deemed guilty of a misdemeanour, and on conviction thereof shall suffer imprisonment with or without hard labour for any period not exceeding three years.

Concealing in-  
solvent's effects.

(II.) Every person who shall forge the seal or any order, certificate or process of the Court, or who shall serve or enforce any

Forgery of seal  
&c.

(a) *Vide* also Chapter I., at p. 24,  
*et seq.*

(b) *Vide* p. 348, and ss. 140 and 141,  
Part VIII. of the Act; *vide* p. 387 *et seq.*,  
*ante*.

(c) *Vide ante*, at p. 65.

(d) *Vide ante*, at p. 337.

(e) S. 156, Act of 1890. The insol-  
vent, however, is specifically mentioned  
in sub-s. vi. as to the offence therein  
set out.

**CHAP. XI.** such forged order or process knowing the same to be forged, or deliver or cause to be delivered to any person any paper falsely purporting to be the original or a copy of any summons, certificate, order, warrant, or other process of the Court or a judge, or who shall act or profess to act under any false colour or pretence of such order, warrant or other process, shall be guilty of a misdemeanour, and being convicted thereof shall be imprisoned with or without hard labour for any term not exceeding three years (*f*).

As to removing,  
embezzling, &c.,  
any property  
under  
attachment.

(III.) If any person shall dispose of, receive, remove, retain, conceal, or embezzle any property, moneys, or securities for moneys belonging to any insolvent estate which have been attached, knowing the same to have been so attached, and with intent to defeat the said attachment, or shall hinder or obstruct or endeavour to hinder or obstruct the messenger or other person authorised to make the same, such person shall on conviction thereof before the Court or any two justices suffer imprisonment with or without hard labour for any period not exceeding six months (*g*).

As to knowingly  
receiving any  
fraudulent  
alienation, &c.

(IV.) If any person shall receive or accept any property from the insolvent with intent to defraud the creditors of the insolvent, such person shall be deemed guilty of a misdemeanour, and on conviction thereof shall suffer imprisonment with or without hard labour for any period not exceeding three years.

Inserting false  
advertisement.

(V.) Any person who shall insert or cause to be inserted in the *Government Gazette* or in any newspaper any advertisement purporting to be under this Act (the Act of 1890) (*h*) without authority, or knowing the same to be false in any material particular, shall be guilty of a misdemeanour, and on conviction thereof shall suffer imprisonment for any period not exceeding three years.

False claim, &c.

(VI.) If any creditor, insolvent or other person in any insolvency or liquidation by arrangement or composition with creditors, in pursuance of this Act (the Act of 1890) (*i*), wilfully and with intent to defraud makes any false claim or any proof, declara-

(*f*) *The Crimes Act 1890*, ss. 251-252, provides heavier punishments for similar offences.

(*g*) *Vide* p. 164, *ante*, as to provisions in s. 65, Act of 1890.

(*h*) S. 1, Act of 1897, may make this offence applicable to that Act, as by it that Act has to be read with the Act of 1890.

(*i*) *Vide* notes (*e*) and (*h*), *ante*.

tion or statement of account which is untrue in any material particular, he shall be guilty of a misdemeanour punishable with imprisonment not exceeding three years with or without hard labour. CHAP. XI.

By s. 157, Act of 1890, any insolvent and any person whose affairs are liquidated by arrangement in pursuance of Part IX. of the said Act, in each of the cases following (I. to XVI.), is deemed guilty of a misdemeanour, and on conviction thereof is liable to be imprisoned for any time not exceeding three years with or without hard labour (k):—

- (I.) If he does not to the best of his knowledge and belief, fully and truly discover to the Court upon any examination under the Act of 1890 or to the trustee administering his estate for the benefit of his creditors all his property real and personal, and how, and to whom, and for what consideration and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his business or trade (if any), or laid out in the ordinary expense of his family, unless the jury is satisfied that he had no intent to defraud (l).

This offence is not complete until the examination is ended (m), and under a former Act (n) for a similar offence it was held that such offence related to answers by the insolvent to enquiries made for the discovery of assets, &c., and not to answers to protect himself from the refusal of a certificate (o).

The word "property" in 32 & 33 Vict. c. 62 from which the provisions of this are taken has the same meaning as in the Act of 1890 (p). The disclosure is, therefore, not restricted to property in possession of the bankrupt at the commencement of his bankruptcy, and consequently it applies to after acquired property (q).

- (II.) If he does not deliver up to such trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he

(k) S. 157—compare 32 & 33 Vict. c. 62, s. 11.

(l) *Vide* s. 1, Act of 1897, and note (h), *ante*.

(m) *Nash v. Regina*, 4 B. & S., 935; 9 Cox C.C., 424.

(n) 5 Vict., No. 17, s. 73.

(o) *In re Thomas*, 1 W.W. & a'B. (L.), 40.

(p) *Vide* ss. 4 and 70.

(q) *Reg. v. Michell*, 14 Cox C.C., 490.

Offences by  
insolvents and  
liquidating  
debtors.

Fraudulent  
failure to fully  
and truly  
discover on  
examination.

Meaning of  
the word  
"property" in  
s. 157.

Fraudulent  
failure to deliver  
up property to  
trustee.

## CHAP. XI.

is required by law to deliver up, unless the jury is satisfied that he had no intent to defraud.

The property required to be delivered up is that which is divisible amongst creditors (*t*). Where the insolvent had endeavoured to retain for himself assets in the shape of furniture, paid for partly by him and partly by his wife, and which was used in his house apparently as his, and he had tried to make it appear that the wife was solely entitled to the furniture the Court held that as an offence it came within this sub-section, but having regard to the colour of title that his wife had and to the furniture being in no way concealed from view and its value, it would not punish the insolvent with imprisonment (*u*).

Fraudulent failure to deliver up books, documents, &c., to trustee, or as trustee directs.

(III.) If he does not deliver up to such trustee, or as he directs, all books, documents, papers and writings in his custody or under his control relating to his property or affairs, unless the jury is satisfied that he had no intent to defraud.

It is no excuse for an insolvent to allege as a ground for not delivering up his books to the trustee, that they are in the custody of a third person (*v*).

Fraudulent concealment of property of ten pounds or upwards or debt due.

(IV.) If before or after sequestration or the commencement of the liquidation, he conceals any part of his property, to the value of ten pounds or upwards, or conceals any debt due to or from him, unless the jury is satisfied that he had no intent to defraud.

Sequestration under Part III. of the Act of 1890 commences from the making of the order placing the estate under sequestration in the hands of one of the assignees and under Part IV. from the making of the order *nisi* (*w*). Liquidation by arrangement is deemed to have commenced as from the date of an appointment of the trustee (*x*). The offence under this sub-section means doing something, and a mere non-disclosure of assets is insufficient (*y*). "His property" means property divisible amongst the insolvent's creditors (*z*). The offence may be committed by an insolvent

(*t*) *Vide* ss. 59, 70 and 128, Act of 1890; and *Reg. v. Tempest*, 3 V.L.R. (L.), at p. 331.

(*u*) *In re Oppenheimer*, 6 V.L.R. (L.), at p. 28.

(*v*) *In re Hearty*, 1 A.L.T., 160.

(*w*) S. 4, Act of 1890.

(*x*) S. 153 (4), *ibid.*

(*y*) *In re Dunphy*, 3 A.L.T., 28.

(*z*) *Reg. v. Tempest*, 3 V.L.R. (L.), at p. 331.

after and notwithstanding the sequestration, and a conviction for the offence is good where the property concealed has been assigned by a deed which is void as an act of insolvency (a). CHAP. XI.

- (v.) If before or after sequestration or the commencement of the liquidation, he fraudulently removes any part of his property of the value of ten pounds or upwards. Fraudulent removal of property of the value of ten pounds or upwards.

A debtor executed an assignment to trustees for the benefit of his creditors, and afterwards fraudulently removed stock of more than ten pounds in value, and immediately after commenced proceedings for liquidation by arrangement. Though the assignment was void for want of registration against the trustee under the liquidation it was held that at the time of the fraudulent removal the assignment was in force, and as the property in the stock removed was in the trustees under the assignment he could not be convicted (b).

- (vi.) If he makes any material omission in any statement relating to his affairs, unless the jury is satisfied that he had no intent to defraud. Fraudulent material omission in any statement relating to his affairs.

Where the insolvent had as the Court thought by an oversight omitted an asset from his schedule, it was held that he had not with intent to defraud made a material omission (c).

- (vii.) If knowing or believing that a false debt has been proved by any person under the insolvency or liquidation he fail for a period of a month to inform such trustee as aforesaid thereof. Failure to inform trustee of proof of false debt.

- (viii.) If after sequestration or the commencement of the liquidation he prevents the production of any book, document, paper or writing affecting or relating to his property or affairs unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law. Fraudulent prevention of the production of any book, document, &c.

- (ix.) If before or after sequestration or the commencement of the liquidation he conceals, destroys, mutilates or Fraudulent destruction, mutilation, or falsification of any book or document relating to his property or affairs, or privy thereto.

(a) *Ibid* p. 329.

(b) *Reg. v. Greese*, 29 L.T. N.S. 897; 12 Cox C.C., 539.

(c) *In re Aarons*, 6 V.L.R. (I.) 56. In this case Molesworth, J., said at p. 62, referring to a further alleged omis-

sion :—"I do not see how an insolvent "stating in his schedule that an asset "is not mortgaged when it really is "can be deemed a fraud upon any "body."

## CHAP. XI.

falsifies or is privy to the concealment, destruction, mutilation or falsification of any book or document affecting or relating to his property or affairs unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law.

Fraudulent false entries in any book or document affecting or relating to his property or affairs.

- (x.) If before or after sequestration or the commencement of the liquidation he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law.

Meaning of book or document.

Prior to sequestration a debtor, at the request of a creditor, made out a balance-sheet, which was found to be wilfully untrue, and done with intent to conceal the state of his affairs and to induce the creditor to give him further credit. On his subsequent insolvency, on it being urged in a certificate application that an offence under this sub-section had been committed, it was held that a balance-sheet so handed to a particular creditor is not a document within the sub-section, and that it relates to account books generally representing the insolvent's affairs to which his creditors generally should be able to resort for information or evidence in the proceedings in insolvency. Unless restricted, as stated, the section is most vague as to the character of the document, and without restriction as to motive for false entry or intended or actual effect, or the time at which it was made (*d*). The insolvent's schedule containing untrue statements is not a book or document within the meaning of the sub-section (*e*).

Insolvent's schedule not within section.

Fraudulently parting with, altering and omissions in any document relating to his property or affairs or privy thereto.

- (XI.) If before or after sequestration or the commencement of the liquidation he fraudulently parts with, alters or makes any omission or is privy to the fraudulently parting with, altering or making any omission in any document affecting or relating to his property or affairs.

Accounting for losses at any meeting of creditors within four months, &c. by fictitious losses or expenses.

- (XII.) If after sequestration or the commencement of the liquidation, or at any meeting of his creditors, within four months next before sequestration or the commence-

(*d*) *In re Clapham*, 10 V.L.R. (I.), 21, 22.

(*e*) *In re Cobain*, 4 A.J.R., 31.

ment of the liquidation he attempts to account for any part of his property by fictitious losses or expenses. CHAP. XI.

- (XIII.) If within four months next before sequestration or the commencement of the liquidation, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same. Fraudulently obtaining property on credit.

Under this sub-section it must be shown distinctly that the credit was obtained by reason of the false representation (*f*). To satisfy the words of this sub-section there must be some active fraud on the part of the bankrupt similar to the making of a false representation and not simply the purchase of goods when he knows that he is not able to pay for them (*g*). Nature of fraud necessary.

- (XIV.) If within four months next before sequestration or the commencement of the liquidation, he being a trader obtains, under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit, and has not paid for the same, unless the jury is satisfied that he had no intent to defraud (*g*). Obtaining property on credit under the false pretence of carrying on business, &c.

The word "trader" is used in this sub-section and in no other portion of this part of the Act. It is used once before in the Act, in sub-s. 7 of s. 141, in respect to offences relating to the refusal or suspension of the certificate. As previously stated this section of the Act (*h*), has been adapted from 32 & 33 Vict. c. 62, s. 11, and the words and expressions defined or explained in 32 & 33 Vict. c. 71 have the same meaning in that Act (*i*). The word "trader" is defined in s. 4 and Schedule I. to 32 & 33 Vict. c. 71. It has been held here that an accountant, broker, commission agent, &c., is not a trader (*k*). The term trader.

(*f*) *In re Clapham*, 10 V.L.R. (I.), 18, following *In re Walters*, 3 W.W. & A.B. (I.), 14, where it was stated that mere exaggeration of the value of property does not amount to proving the offence, nor the debtor stating he was doing a very good business, or that at a time when a change of management had occurred in his business it had improved his prospects, nor has the fact of the value of business and business property being untruly exaggerated, been held to amount to a false pretence.

(*g*) *Ex parte Brett*, in *re Hodgson*, 1

Ch. D., at p. 154. In this case the debtor being in insolvent circumstances, purchased goods at London on credit and shipped them to Australia and obtained advances by pledging the bills of lading. This case was also held not to be within sub-ss. 14 and 15. *Vide also Ex parte Stallard, re Howard*, L.R., 3 Ch., 408.

(*h*) S. 157.

(*i*) 32 & 33 Vict. c. 62, s. 3.

(*k*) *Per Molesworth, J.*, in *re Aarons*, 6 V.L.R. (I.), at p. 60, decided under sub-s. 7, s. 141, Act of 1890.

## CHAP. XI.

Where an insolvent is charged with obtaining credit by false pretences, the pretence must be shown to have been made by him in answer to distinct inquiries, so that the man knows that he obtains goods on credit given in reliance upon the truth of his answers, and the supposed truth of the answers must be the motive of the creditor parting with his goods (*l*).

Whether the debtor intended to defraud the vender or not often depends upon the question whether there was any reasonable probability of his being able to pay the price, that is the expectation that any reasonable man in such a position would entertain (*m*). The thing aimed at however in this and the following sub-section is the obtaining of goods on credit, and then immediately selling them at a loss; that is not in the ordinary course of business. The evidence must show that the debtor dealt with the goods otherwise than in the ordinary course of business. It was not intended that every insolvent trader who purchased goods without expecting to be able to pay for them should be within the provisions (*n*).

Fraudulent  
pawning  
pledging or  
disposing of  
property  
otherwise than  
in the ordinary  
course of  
business.

(*xv*.) If within four months next before sequestration or the commencement of the liquidation he pawns, pledges or disposes of otherwise than in the ordinary way of his trade or business, any property which he has obtained on credit, and has not paid for, unless the jury is satisfied that he had no intent to defraud (*o*).

To buy goods on one day on credit at a long date, and then sell them clandestinely immediately afterwards at a much less price must be a fraud. It is like the case of receiving stolen goods in this particular, that the price which the receiver pays or says he has given affords evidence of the *scienter* (*p*). Therefore if an insolvent has bought goods on credit when in difficulties for the purpose of selling immediately below the cost price, or for the purpose of raising money (*q*) upon them wherewith to meet his difficulties, and sells them accordingly, he is guilty of the offence of unlawfully disposing of goods otherwise than in the ordinary

(*l*) *In re Goldsmith*, 5 V.L.R. (I.), 18.

(*m*) *Ex parte and in re Fryer*, 10 L.T. N.S., 197.

(*n*) *Ex parte Brett, in re Hodgson*, 1 C.D., at p. 153, per Mellish, J.

(*o*) *Vide notes to sub-s. 13.*

(*p*) *Reg. v. Morris*, 1 V.L.R. (L.), at p. 101.

(*q*) "Financing" according to the insolvent's account.



way of his trade or business (r). A grocer obtained goods of his trade on credit, and soon after, before they were paid for, he executed a bill of sale in favor of his sister, in consideration of a debt owing from him to his sister, which passed away all his stock-in-trade and effects, including the goods in question. His estate having been sequestrated, it was held that disposing of the goods by bill of sale was not disposing of them in the ordinary way of trade, and therefore that as property which the bankrupt had obtained on credit and had not paid for had passed by the bill of sale, he came within the sub-section, unless he had no intent to defraud, and that assigning the whole of his property to one creditor, reserving nothing for the others, showed an intent to defraud (s).

- (xvi.) If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to any agreement with reference to his affairs or his insolvency or liquidation.

Fraudulently obtaining consent of creditors to agreement in insolvency or liquidation.

A false representation made by an insolvent of his affairs, whereby he induced a creditor to renew bills, does not constitute an offence under this sub-section (t). False representations by an insolvent for the purpose of inducing the creditors to grant him a concession as to furniture under s. 70 (2), Act of 1890, do not come within the terms of this sub-section, as such concessions are not agreements with insolvents. The sub-section has reference to agreements between the insolvent and his creditors for composition, &c. (u).

The onus of proof in sub-ss. 1, 2, 3, 4, 6, 8, 9, 10, 14 and 15 would appear to lie on the accused to show that he did not intend to defraud (v). To make the false representation fraudulent under sub-ss. 13 and 14 it must be made knowingly by the debtor (w), and under sub-s. 14, where the debtor pretends to be dealing in the ordinary way of business, but is not in reality

Evidence as to criminal offences.

(r) *Reg. v. Morris*, ante.

(s) *Reg. v. Thomas*, 22 L.T. N.S., 138.

(t) *In re Stocks*, 4 A.J.R., 173.

(u) *In re Aaron*, 6 V.L.R. (I.), 56.

(v) *Vide Reg. v. Bolus*, 11 Cox C.C., 610 (referring to *Reg. v. Thomas*, *ibid.*, 535). In this case the defendant who was a tool maker gave an order for six tons

of steel. On arrival at his wharf he did not allow the goods to be unloaded but sold them for fourteen shillings per cwt. cash, the estimated value being eighteen shillings per cwt. *Held*, that if the defendant did not negative fraud in the transaction he must be held guilty.

(w) *Reg. v. Cherry*, 12 Cox C.C., 32.

**CHAP. XI.** doing so, the onus is on him to satisfy the jury that he was acting honestly and had no intention to defraud (x).

Admissibility of depositions.

Upon the trial of an insolvent for an offence under the Acts his depositions, taken at a compulsory examination under ss. 134 to 137 of the Act of 1890, are admissible as evidence against him, notwithstanding s. 219 of the *Transfer of Land Act* 1890, which enacts that nothing therein contained entitles any person to refuse to answer any question or interrogatory in any civil proceeding in any Court of law or equity or *insolvency*, but no answer to any such question or interrogatory is admissible in evidence against such person in any criminal proceeding (y). The mere circumstance that the answers were given under compulsion does not affect their admissibility as evidence against the person giving them. At common law no person can be compelled to criminate himself, but if he choose to answer a question voluntarily his answer is admissible against him, or if an Act, as this does, provides that he must answer and affords him no protection from the consequences of his answers, his position appears substantially the same as if he answered voluntarily. The *Insolvency Statute* 1865 did afford protection, but it has not been re-enacted (z). It has been held, however, that where the depositions have not been reduced into writing and signed by the insolvent they are inadmissible (a). If the insolvent answers questions as to matters not contemplated by ss. 134 and 135 of the Act, his answers are regarded as voluntary and are admissible against him on a criminal charge (b).

Parol evidence of examination.

Parol evidence of anything an insolvent says at the time of his examination cannot be received although it appears that no part of what he said was taken down in writing (c).

Proof of proceedings.

In a prosecution care should be taken to prove all the formal proceedings in order. Proof of an allegation that a person is insolvent is made by the production of the office copy of the

(x) *Reg. v. Cherry*, ante.

(y) *Reg. v. McCooey*, 5 V.L.R. (L.), 38; *Reg. v. Hillam*, 12 Cox C.C., 174; *Reg. v. Robinson*, 1 L.R. C.C., 80.

(z) *Reg. v. McCooey*, ante; vide also *Reg. v. Robinson*, 1 L.R. C.C., 80; 10 Cox C.C., 467; *Ex parte Hall*, in re Cooper, 19 C.D., 580; *In re Goldsmith*, 5 V.L.R. (L.), 18; *Davey v. Bailey*, 10

V.L.R. (E.), 240; vide *In re Tillet*, ex parte Harper, 7 Morrell, at p. 291, as to suggested questions. See also Chapter VII., p. 364, as to admissibility of depositions.

(a) *Reg. v. Kean*, 20 L.T.N.S., 498.

(b) *Reg. v. Sloggett*, 1 Dears C.C., 658.

(c) *Re v. Walters*, 5 Car. & P., 138.

order of sequestration or adjudication of sequestration together with proof of the identity of the party therein named (*d*), and if the depositions of the insolvent are to be relied on evidence that the same were taken under the provisions of the Act and consequently proof of the steps necessary for the trustee to take under ss. 134 and 135 is required, as answers on an examination under the Acts are substantially the same as if they were voluntary (*e*) and they should be shown to have been taken under its provisions, but irregularities in the procedure as to the examination can be waived by the insolvent submitting to be examined (*f*). The exhibits ought not to be allowed to be removed from the Court except upon a promise to produce them at the proper time (*g*). All the provisions of the Acts so far as they are applicable, excepting Part VIII. of the Act of 1890, apply to the case of a liquidation by arrangement in the same manner as if the word "insolvent" included a debtor whose affairs are under liquidation and the word "sequestration" included liquidation by arrangement, and the appointment of a trustee under a liquidation is deemed, according to circumstances, to be equivalent to and a substitute for the order of sequestration or the service of an order of sequestration (*h*).

CHAP. XI.

Exhibits.

Provisions relating to insolvency apply to liquidation by arrangement.

As to fraud in cases of composition and the punishment therefor, *vide ante*, at p. 439.

Fraud in cases of composition.

If any insolvent or person who has his affairs liquidated by arrangement after sequestration or the commencement of the liquidation, or within four months before such sequestration or commencement, quits Victoria and takes with him, or attempts or makes preparation for quitting Victoria and for taking with him any part of his property to the amount of twenty pounds or upwards which ought by law to be divided amongst his creditors, he is (unless the jury is satisfied that he had no intent to defraud) guilty of felony, punishable with imprisonment for a time not exceeding three years with or without hard labour (*i*).

Absconding with property of twenty pounds and upwards.

As to the limits of Victoria, *vide* Chapter IV., at p. 113. This provision applies to persons whose estates are sequestrated as well

(*d*) S. 25, Act of 1890.

(*e*) *Vide Reg. v. McCoory*, 5 V.L.R. (L.), at p. 42.

(*f*) *Reg. v. Widdop*, 2 L.R. C.C., 3; 12 Cox C.C., 251.

(*g*) *Kirkham v. Julian*, 11 V.L.R., at p. 174.

(*h*) S. 153 (7-11); s. 1, Act of 1897.

(*i*) S. 159—compare 32 & 33 Vict. c. 62, s. 12.

**CHAP. XI.** as to persons whose affairs are liquidated by arrangement. Therefore, where the debtor left the colony carrying with him property exceeding £20 in value, and his estate was sequestrated seven days after, he was convicted under the above section (*j*). Where a prisoner was committed for detention under an extradition warrant reciting that he had been charged with felony in that his affairs being in course of liquidation he did within, &c., and feloniously quit and take with him property to the amount, &c., the warrant was held to be good though not stating that the property was his or divisible amongst his creditors (*k*).

Any person fraudulently obtaining credit.

Fraudulent gift delivery or transfer of or charge on property.

Fraudulent concealment or removal of property within two months before an unsatisfied judgment or order.

Any person in each of the cases following is deemed guilty of a misdemeanour, and on conviction thereof is liable to be imprisoned for any time not exceeding one year with or without hard labour, that is to say (*l*):—(I.) If incurring any debt or liability he has obtained credit under false pretences or by means of any other fraud; (II.) if he has with intent to defraud his creditors or any of them made or caused to be made any gift, delivery or transfer of or any charge on his property; (III.) if he has with intent to defraud his creditors concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him. The words “any person” are not necessarily limited to any person who has sequestrated his estate (*m*), and therefore a person was convicted of the offence of obtaining credit by means of fraud (*n*) under the following circumstances:—The defendant ordered a meal at a restaurant, but made no verbal representation at the time as to his ability to pay, nor was any question asked him in regard to it; after the meal, he said he was unable to pay, and that he had, as was the fact, only one halfpenny in his possession (*o*). It is the postponement of payment that an insolvent must obtain by false pretences to constitute an offence under sub-section one, and “obtaining credit” is not the same as “obtaining property on credit” (*p*). An objection in a certificate application that an insolvent had contracted debts by means of false pretences and misrepresentations should allege who the

(*j*) *Reg. v. Rosenwax*, 3 A.J.R., 28.

(*k*) *In re Fishenden*, 4 V.L.R. (L.), 143.

(*l*) S. 160—compare 32 & 33 Vict. c. 62, s. 13, and *Imprisonment of Fraudulent Debtors Act* 1890, s. 5.

(*m*) *Reg. v. Poole*, 3 V.R. (L.), 181; 3 A.J.R., 79; *Reg. v. Rowland*, 8 Q.B.D., 530; 15 Cox C.C., 31.

(*n*) S. 160 (1).

(*o*) *Reg. v. Jones*, (1898) 1 Q.R., 119.

(*p*) *In re Hearty*, 1 A.L.T., 160.

creditors were who had been cheated, and the nature of the particular false representations by which credit had been fraudulently obtained, and the evidence in support of such an objection ought to be the same as would sustain an information for obtaining goods by false pretences, and proof of mere exaggeration as to the value of property is not sufficient (*q*). In sub-s. 2, the word "transfer" cannot be read as including a "lease," as the section is a penal one. The word "charge" might however include it (*r*). The offence under sub-s. 2 is the making away by an insolvent with his property with the intent to defraud his creditors, which may be done in one of the three ways stated by "gift," "delivery," or "transfer," and evidence of any one of them is sufficient to support the count, and it has been held that evidence may also be given as to insolvent's dealings with his property generally where the charge is that he made a "gift delivery and transfer" of a specific part of his property to show his general intent to dispose of his property to defraud his creditors (*s*). The insolvent to be guilty of a fraudulent transfer must apparently be so either under the insolvency laws or under the Statute of Elizabeth (*t*), and a defendant to a breach of promise action, who before judgment creates a charge over all his property with intent to defraud the plaintiff in the action, is not guilty of a misdemeanour under this sub-section, as the plaintiff is not a creditor within its meaning until judgment (*u*).

Where a debtor makes any arrangement or composition with his creditors under the provisions of the Acts, he remains liable for the unpaid balance of any debt which he incurred or increased or whereof before the date of the arrangement or composition he obtained forbearance by any fraud provided the defrauded creditor has not assented to the arrangement or composition otherwise than by proving his debt and accepting dividends (*v*). The term "arrangement" is used in the section, but its provisions apply to ss. 153 and 154, Act of 1890, and apparently to s. 131 of the same Act (*w*). The creditor who alleges fraud under

Continued liability for debts incurred by fraud under "arrangement" or "composition."

(*q*) *In re Wallers*, 3 W.W. & a'B. (I.), 14.

(*r*) *In re Aarons*, 6 V.L.R. (I.), at p. 65.

(*s*) *Reg. v. Yorke*, 13 V.L.R., 393.

(*t*) *Vide In re Cranston*, 9 Morrell, 169; and *vide Ex parte Chaplin, re Sinclair*, 26 C.D., 319, as to fraudulent

transfers within the English Bankruptcy Statutes.

(*u*) *Reg. v. Hopkins*, 4 Manson, 134; (1896) 1 Q.B., 652.

(*v*) S. 161—compare 32 & 33 Vict. c. 62, s. 15.

(*w*) *Re Crosley, Munns v. Burn*, 35 C.D., 266.

**CHAP. XI.** this provision in the contracting of the debt, may sue after receiving a composition from his debtor without being obliged to prove to the Court of Insolvency a *prima facie* case of fraud (x).

(x) *Ex parte Halford, re Jacobs*, L.R. 19 Eq., 436.

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# APPENDIX.

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THE INSOLVENCY ACT 1890 [No. 1102].

THE INSOLVENCY ACT 1897 [No. 1513].

THE INSOLVENCY ACT 1898 [No. 1544].

RULES OF THE SUPREME COURT 1884 RELATING TO PART IV. OF  
THE INSOLVENCY ACT 1890 AS TO COMPULSORY SEQUES-  
TRATIONS.

RULES OF THE SUPREME COURT UNDER PARTS VI. AND VIII. OF  
THE INSOLVENCY ACT 1897 AND APPENDIX OF FORMS RE-  
LATING TO SAME.

THE INSOLVENCY RULES 1898 AND APPENDIX OF FORMS THERE-  
TO.





# THE INSOLVENCY ACT 1890

No. 1102.

[The figures at the end of the sections relate to the pages of the text where the subject is referred to.]

## AN ACT TO CONSOLIDATE THE LAW RELATING TO INSOLVENTS AND THEIR ESTATES.

[10th July, 1890.]

BE it enacted by the Queen's Most Excellent Majesty by and with *Insolvency Statute 1871.*  
the advice and consent of the Legislative Council and the Legislative  
Assembly of Victoria in this present Parliament assembled and by the  
authority of the same as follows (that is to say) :—

1. This Act may be cited as the *Insolvency Act 1890*, and shall come Short title commencement and division.  
into operation on the first day of August One thousand eight hundred  
and ninety, and is divided into Parts and Divisions as follows :—

PART I.—Constitution of Court ss. 5-19.

PART II.—Practice ss. 20-33.

PART III.—Voluntary Sequestrations ss. 34-36.

PART IV.—Compulsory Sequestrations ss. 37-51.

PART V.—

Administration of  
Estate.

Division 1. — Assignees and Trustees,  
their Appointment and Election ss.  
52-58.

Division 2.—Vesting and Realization of  
Estates ss. 59-105.

Division 3.—Proof of Debts ss. 106-122.

Division 4.—Distribution of Estate ss.  
123-127.

## SECS. 1-4.

*Insolvency  
Statute 1871.*

PART VI.—Insolvent ss. 128-133.

PART VII.—Examination of Insolvent and other persons ss. 134-137.

PART VIII.—Certificate ss. 138-152.

PART IX.—Liquidation by arrangement s. 153.

PART X.—Composition with Creditors ss. 154 and 155.

PART XI.—Offences against Insolvent Law ss. 156-163.

Repeal.  
Schedule.

2. The Acts mentioned in the Schedule to this Act to the extent to which the same are thereby expressed to be repealed are hereby repealed. Provided that such repeal shall not affect any sequestration composition liquidation appointment election application rule regulation order affidavit or declaration made, or any resolution passed, or any petition presented, or any attachment disclaimer registration or service effected, or any notice given, or any certificate or summons issued, or any bail security warrant or other written instrument taken or granted, or any warrant of attorney *cognovit actionem* alienation contract covenant conveyance gift delivery transfer settlement surrender release bill of sale mortgage pledge or any deed whatsoever in force entered into or executed under the said Acts or either of them before the commencement of this Act; provided also that any person who shall before the commencement of this Act have committed an act of insolvency under the *Insolvency Statute 1871* shall be deemed to have committed an act of insolvency under this Act.

Act not to  
affect winding  
up Acts or  
*Transfer of  
Land Act 1890.*

3. Subject to the provisions of Part IV. of the *Supreme Court Act 1890*, nothing in this Act contained shall affect the provisions of any Act now in force relating to the winding up of companies for trading or mining purposes.

The *Transfer of Land Act 1890* shall with reference to estates sequestrated under this Act be construed as if the same had been passed after the coming into operation hereof.

Previous Acts  
relating to  
insolvency to  
apply to this  
Act.

Where in any Act of Parliament passed before the commencement of this Act mention is made of any sequestration or adjudication of sequestration or insolvency or chief or other commissioner of insolvent estates or official or creditors' assignee or insolvent, the same shall be construed with reference to sequestrations adjudications of sequestrations judges assignees trustees and insolvents under this Act.

Definition of  
terms.  
*ib. s. 5.*

4. In the construction of this Act unless it be otherwise expressly provided or unless the subject or context requires a different construction—

- "Adjudication of sequestration" shall mean an order absolute under Part IV. of this Act. SEC. 4.
- "Chief clerk" shall mean chief clerk of the court of the district in which the proceedings are being prosecuted, and in Parts IX. and X. shall mean the chief clerk of the district in which the debtor might present a petition for sequestration. (p. 37, *ante*). Insolvency  
Statute 1871.  
"Adjudication."  
"Chief clerk."  
Ib. s. 162.
- "Court" shall mean the Court of Insolvency. (p. 133, *ante*). "Court."
- "Debt provable in insolvency" shall mean any debt or liability or claim made provable by this Act against the insolvent estate. (p. 279, *ante*). "Debt provable  
in insolvency."
- "District" or "the district" shall mean the district of the Judge of the Court of Insolvency in which the insolvent respondent or debtor shall reside or to which the proceedings may be transferred; and an insolvent respondent debtor or other person shall be deemed to reside in that district in which he has lived or carried on business during the six months immediately preceding the sequestration or debtor's summons or for the longest period during such six months. (pp. 15-16, 76, 104, *ante*). "District."
- "Insolvent estate" shall mean the property vested in an assignee or trustee under this Act. "Insolvent  
estate."
- "Judge" shall mean judge of the court of insolvency of the district in which the proceedings are being prosecuted. (p. 347, *ante*). "Judge."
- "Order of or for sequestration" and "sequestration" shall mean and include an order of sequestration under Part III. and an order *nisi* under Part IV. of this Act; "before" or "after sequestration" shall mean before or after an order under Part III. or an order *nisi* under Part IV. has been made; and "before" or "after adjudication of sequestration" shall mean before or after an order absolute under Part IV. has been made; and an estate shall be deemed to be "sequestrated" when an order under Part III. or an order *nisi* under Part IV. has been made, and an estate shall be deemed to be "adjudged to be sequestrated" when the order *nisi* has been made absolute. "Order of or  
for sequestration  
and 'seques-  
tration.'"
- "Property" shall mean and include money goods things in action land and every description of property whether real or personal, also obligations easements and every description of estate interest and profit present or future vested or contin- "Property."  
32 & 33 Vict.  
c. 71 s. 4.

**SECS. 4-7.**

*Insolvency  
Statute 1871.*

"Respondent."

gent arising out of or incident to property as above defined.  
(pp. 202, 212, 217, *ante*).

"Respondent" shall mean any person against whom an order nisi  
, under Part IV. has been made.

"Rules."

"Prescribed."

"Rules" shall mean the rules for the time being in force or to be  
made under this Act, and "prescribed" shall mean prescribed  
by the rules.

**PART I.—CONSTITUTION OF COURT.**

Court of  
Insolvency.

*Ib. s. 6.*

See 32 & 33 Vict.  
c. 71 s. 65.

Affected by ss.  
3 and 4 Act of  
1897.

5. A court of record, to be called the Court of Insolvency, is hereby declared to have been and the same is established in and for Victoria. The Court of Insolvency shall be a court of law and equity, and shall have a seal wherewith shall be sealed all records documents proceedings and copies thereof which may require sealing, and whereof all courts judges and justices shall take judicial notice; and such court shall for the purposes of this Act have and use all the powers rights incidents and privileges of the Supreme Court of Victoria; and the judges of the said court when sitting in chambers for the despatch of business shall have and may exercise all the same and the like powers as are now possessed by any judge of the Supreme Court sitting in chambers; and all barristers-at-law and attorneys of the Supreme Court may practise and be heard in such court subject to the rules. (pp. 1, 3, 9, 11, 26, 173, *ante*).

Jurisdiction of  
court.

*Ib. s. 7.*

Affected by  
Part I. Act of  
1897.

6. The Court shall have original jurisdiction and control in all matters of insolvency save where it is otherwise by this Act expressly provided, and may hear and determine any matter relating to the disposition of the insolvent estate or of any property taken under the sequestration, and claimed by the assignees or trustees for the benefit of the creditors, or relating to any acts done or sought to be done by the assignees or trustees in their character of assignees or trustees by virtue or under colour of the sequestration, and also in any matter of insolvency as between the assignees or trustees and any creditor or other person appearing or otherwise submitting to the jurisdiction of the said court, and in any other matter where the court has jurisdiction by virtue of this Act. (pp. 3, 12, *ante*).

Appointment  
and qualifica-  
tion of judge.

*Ib. s. 8.*

7. The Governor with the advice of the Executive Council may, in case of the death resignation or removal of any judge of the court of insolvency, appoint a fit person in his place to be a judge of the said court, who shall be a barrister-at-law of Victoria of seven years' standing, or who shall have practised as an advocate or barrister either in

England Ireland Scotland Victoria or any of them for such period as shall make an aggregate of seven years. (p. 1, *ante*). **SECS. 7-11.**

A judge appointed under this section shall not during his continuance in such office practise as a barrister-at-law or be capable of being elected or of sitting as a member of the Legislative Council or Legislative Assembly.

*Insolvency Statute 1871.*  
Judge not to practise as a barrister or sit in Parliament.  
See 32 & 33 Vict. c 71 s. 69.

8. All judges of county courts in Victoria shall be judges of the court, and such court may be held by and before any of the judges thereof at different places in Victoria at the same or at different times. (p. 1, *ante*).

Judges of the court.  
*Ib.* s. 9.

The Governor in Council shall and may, in case of necessity, appoint some fit and proper person possessing the qualification aforesaid to act for and in the stead of any of the judges of the court; and such person when so acting shall have use and exercise all the powers authority jurisdiction rights and privileges of the judge in whose stead he is appointed.

Power to appoint acting judges.

The Governor in Council may from time to time by notice in the *Government Gazette* assign one or more districts to all or such one or more of the judges of the court as he may think fit, and appoint places at which and the periods within which the court shall be held within such districts, and may in like manner revoke any such appointment or alter such places and periods. (p. 16, *ante*).

Districts to be assigned by Governor.

9. Any judge after sequestration under Part III. of this Act or adjudication of sequestration at the request in writing of the majority in number of the creditors who have proved debts shall and upon the like request of the assignee or trustee may direct that all or any part of the proceedings in any estate attached to his district shall be conducted in some other district. (p. 13, *ante*).

Power of judge to transfer proceedings under sequestration to other district.  
*Ib.* s. 10.

10. The Governor in Council may, subject to the provisions of the *Public Service Act* 1890, appoint one or more chief clerks of the court for each district, and any such chief clerk may remove, and upon the death resignation or removal of any such chief clerk may appoint another in his stead. (pp. 2, 15, 77, *ante*).

Power to appoint chief clerks.  
*Ib.* s. 11.

11. Any person desirous of appealing from any order of the court shall be entitled to appeal against such order to the Supreme Court upon giving notice within fourteen days next after the same shall have been pronounced of such desire to the opposite party together with a statement in writing setting forth briefly and distinctly the grounds on which it is intended to support such appeal, and in all cases except

Appeal to Supreme Court.  
*Ib.* s. 12.

**SECS. 11, 12.** appeals against the granting suspension or refusal of any certificate upon also paying into court within the like time the sum of twenty pounds as security for costs to abide the event of such appeal ; and the Supreme Court may on such appeal confirm reverse or vary such order, with or without costs as it may think fit ; and such appeal shall be heard at such times and subject to such directions as the judges of the Supreme Court shall by any rule or order direct : The judge who made the order appealed against shall forward to the Supreme Court a copy of his notes of the evidence taken before him together with a statement of his reasons for making such order.

*Insolvency  
Statute 1871.*

Appeal not to  
operate as stay  
of proceedings.

No proceedings under any order so appealed against shall be stayed pending such appeal except by the order of the court on such terms as to costs security or otherwise as the said Court may think proper to impose. (pp. 19, 20, 21, 23, 58, 400, *ante*).

Power to make  
rules.  
*Ib. s. 13.*

**12.** The Governor in Council may appoint any two of the judges of the said court together with a law officer two of whom shall form a quorum to frame rules for the following purposes :—

- (I.) For regulating the practice and procedure of the court of insolvency, and the fees to be paid therein, and the several forms of petitions affidavits orders summonses warrants commissions and other proceedings to be used in the said court in all matters under this Act.
- (II.) For regulating the duties of insolvents the trustees and assignees and other officers of the court.
- (III.) For regulating the transmission of orders depositions and other documents, and the transference of proceedings from one district to another.
- (IV.) For regulating service of process of any kind issuing out of the said court, including provisions for substituted service.
- (V.) For regulating the proceedings at meetings of creditors the notice to be given thereof and the places where the same shall be held.

See 32 & 33 Vict.  
c. 71 s. 78.

The rules may prescribe regulations as to the valuing of any debts provable in insolvency, as to the valuation of securities held by creditors, as to the giving or withholding interest or discount on or in respect of debts or dividends, and as to any other matter or thing whether similar or not to those above enumerated in respect of which it may be expedient to make rules for carrying into effect the object of this Act. And any

or all of such rules may be repealed varied or altered as occasion may require; and all rules made under the powers hereby given shall be promulgated by and take effect from the date of publication in the *Government Gazette*. So far as rules do not extend the principles practice and rules on which the Supreme Court has heretofore acted in dealing with insolvency proceedings shall be observed.

SECS. 12-16.

*Insolvency  
Statute 1871.*

All rules to be made under this section shall be laid before both Houses of Parliament within ten days after their being promulgated, or if Parliament be not then sitting as soon as Parliament shall thereafter assemble for the despatch of business, and all such rules shall be judicially noticed. (pp. 2, 3, 53, *ante*).

13. *The judges of the Supreme Court or of the court of insolvency may in all matters before them whether in court or chambers award either out of the insolvent estate or against any person or persons such costs as to them shall seem just.*

Power to award costs.

*Ib. s. 14.*

Repealed.

*Vide s. 10 (4)  
Act of 1897.*

14. *The court may commit any insolvent or other person whom it may believe to have committed or who may be charged before it with the commission of any of the offences specified in Part XI. of this Act to take his her or their trial and may grant or refuse bail to such insolvent or other person, and for the aforesaid purposes shall have all the powers of a police magistrate.*

Power to commit for trial.

*Ib. s. 15.*

Repealed.

*Vide s. 8 Act of  
1897.*

15. In any insolvency or any other proceeding within the jurisdiction of the court the parties concerned or submitting to such jurisdiction may, at any stage of the proceedings by consent, state any question or questions in a special case for the opinion of the court, and the judgment of the court shall be final, unless it be agreed and stated in such special case that either party may appeal; and the parties may, if they think fit, agree that upon the question or questions raised by such special case being finally decided a sum of money, fixed by the parties or to be ascertained by the court or in such manner as the said court may direct, or any property or the amount of any disputed debt or claim shall be paid delivered or transferred by one of such parties to the other of them either with or without costs. (pp. 15, 22, 59, *ante*).

Questions raised by consent.

*Ib. s. 16.*

Payment of money or delivery of property by party on judgment being given.

16. No action shall be brought or suit instituted in any court of law or equity to recover any chattels personal taken or claimed by any assignee or trustee or the value thereof or any damages in respect of the taking thereof, provided the value of such goods and chattels or such damages do not exceed the value of two hundred and fifty pounds, but the court may decide the right of property in any such chattels upon the application of the assignee trustee or any person claiming to

No action to be brought in respect of chattels personal taken under the insolvency but court to make order in the matter.

*Ib. s. 17.*

**SECS. 16-22.** be entitled thereto and may make such order for the delivery up to or retention of such chattels by the assignee or trustee or such person or if the same shall have been sold then for the payment of the value thereof and if any damages are claimed for the payment of such amount as may be awarded by the court out of the estate of the insolvent or by the assignee or trustee or such person as the court may think fit to the person entitled thereto. (p. 12, *ante*).

Orders how to be enforced.  
*Ib.* s. 18.  
See 32 & 33 Vict. c. 71 s. 60.

**17.** All orders of the court or a judge shall be enforced in the same way as orders of the Supreme Court or of a judge of the Supreme Court are now enforced, or in such other mode as may be prescribed. (pp. 3, 10, 26, 69, *ante*).

Evidence how to be taken.  
*Ib.* s. 10.

**18.** The court may in all matters within its jurisdiction take the whole or any part of the evidence either *viva voce* on oath or by interrogatories in writing or upon affidavits or by commission. The evidence of persons examined before the court shall be reduced to writing by the judge. (p. 33, *ante*).

Who to be subject to Act.  
*Ib.* s. 20.  
See *ib.* s. 120.

**19.** All debtors including aliens and denizens and persons having privilege of Parliament shall be capable of becoming insolvent or be liable to be made insolvent under this Act, and shall be subject to all the provisions thereof and entitled to the benefits thereby given. (pp. 3, 77, 88, *ante*).

## PART II.—PRACTICE.

Copy of order of sequestration to be sent to the Registrar-General.  
*Ib.* s. 21.

**20.** The chief clerk shall forthwith forward a copy of every order of sequestration under Part III. of this Act or adjudication of sequestration to the Registrar-General who shall cause the same to be registered as the rules may direct. (pp. 72, 145, 205, *ante*).

Agent of creditor may act for creditor.  
*Ib.* s. 22.  
See *ib.* s. 80 (s).

**21.** The duly authorized agent of any creditor whether a corporation or not shall have authority to do all acts matters and things authorized or required to be done by any creditor under or by virtue of this Act as fully and effectually as such creditor could or might do. (pp. 30, 84, 121, 160, *ante*).

Signature by firm.  
*Ib.* s. 23.  
Affected by s. 13 Act of 1897.

**22.** Any petition for sequestration of the estate of any debtor to a firm signed with the name or style of such firm by any partner thereof shall be held to be duly signed for the purpose of any such petition, and any acceptance of any offer of composition or security for composition or any release and any authority to vote or to do any act matter or thing under this Act shall be deemed duly signed if signed with the name or style of the firm by any partner thereof; and any proof of



debt may be made by one partner on behalf of the others. (pp. 31, 86, SECS. 22-27. 103, 159, 298, *ante*).

**23.** In reckoning the votes at any meeting of creditors, the partners of any firm and any persons in whom the joint administration of any estate is vested as aforesaid shall be entitled to one vote only and shall be considered as one person. (p. 162, *ante*).

*Insolvency  
Statute 1871.*

Votes of partners  
or administra-  
tors.

*Ib. s. 24.*

**24.** The judges of the Supreme Court may make rules in the same way as rules of the Supreme Court may now be made for the purpose of giving effect to this Act in all matters in which jurisdiction is given by this Act to the Supreme Court or a judge thereof.

Supreme Court  
may make rules.

*Ib. s. 25.*

**25.** In all suits or actions and in all informations under this Act, where it shall be necessary to allege or prove that any party became or was insolvent or that his estate was sequestrated or adjudged to be sequestrated, it shall be sufficient merely to allege that such party being insolvent within the meaning of this Act his estate was sequestrated, without setting forth any order for sequestration or setting forth or proving any petition or any petitioning creditor's debt or act of insolvency; and proof of such allegation may be made by the production of an office copy of the order of sequestration or adjudication of sequestration and (on proof of the identity of the party therein named) such proof shall be sufficient for the purposes of such allegation. (pp. 32, 461, *ante*).

Proof of  
insolvency in  
any action or  
other  
proceeding.

*Ib. s. 26.*

**26.** When the votes of creditors are to be counted in number, no creditor whose debt is below twenty-five pounds sterling shall be reckoned in number, but the debt due to such creditor shall be computed in value; and in all cases in which any deduction is directed by this Act to be made from the amount of the debt of any creditor, the vote of such creditor shall still be counted in value to the extent of the balance remaining after such deduction, and such creditor shall also be reckoned in number provided such balance amounts to twenty-five pounds and upwards. (pp. 14, 162, *ante*).

What creditors  
entitled to vote  
in number and  
what in value

*Ib. s. 27.*

**27.** Any affidavit or declaration required to be sworn or made in relation to any matter under this Act may be lawfully sworn:—

Affidavits.

*Ib. s. 28.*

- (I.) In Victoria before any commissioner of the Supreme Court for taking affidavits.
- (II.) In any other place under the dominion of Her Majesty before any court judge or person lawfully authorized to take affidavits.
- (III.) In any foreign parts out of her Majesty's dominions before a

**SECS. 27-31.**

*Insolvency  
Statute 1871.*

magistrate the oath being attested by a notary or before a British consul or vice-consul.

- (iv.) Any affidavit of any prisoner in any prison or gaol in Victoria to be used in any matter under this Act may be sworn before a commissioner of the Supreme Court for taking affidavits or before the keeper of such prison or gaol, and every such keeper is hereby required and authorized to administer the oath upon any such affidavit without fee or reward.

And all courts judges justices commissioners and persons acting judicially shall take judicial notice of the seal or signature (as the case may be) of any such court judge magistrate commissioner keeper or other person attached appended or subscribed to any such affidavit. (p. 35, *ante*).

Judicial notice to be taken of signature of judge or chief clerk and of the seal of the court.  
*Ib. s. 20.*

- 28.** All courts judges justices and persons acting judicially shall take judicial notice of the signature of any judge or chief clerk appointed under this Act and of the seal of the court subscribed or attached to any judicial or official proceeding or document to be made or signed under this Act. (p. 32, *ante*).

Commissions to take evidence to be under hand of judge and seal of court.  
*Ib. s. 30.*

- 29.** All commissions to take evidence under this Act shall be under the hand of a judge and the seal of the court, and shall if the witness reside in Victoria be directed to a chief clerk of the court, and if the witness reside out of Victoria to such person as the court may think fit. (p. 33, *ante*).

Applications for summonses &c. may be before judge in chambers.

Subpœnas may be issued by clerk of court.  
*Act No 411 s. 4.*

- 30.** Applications for summonses or warrants of the court under this Act and all *ex parte* applications to the court may be heard and disposed of by a judge sitting in chambers. Provided nevertheless that summonses in the nature of subpœnas for witnesses may at any time be issued by the chief clerk without the order of a judge, and shall have the same force and effect as if issued under such order. (pp. 34, 37, 39, 40, 358, *ante*).

Want of form not to invalidate proceedings.  
*Insolvency  
Statute 1871  
s. 31.*

- 31.** No petition order summons warrant commission or other proceeding or document of or to be used by or before the Supreme Court or court of insolvency or a judge thereof shall be invalidated by reason of any want of form or omission therein unless the court or judge shall be of opinion that substantial injustice has been caused by such want of form or omission and that such injustice cannot be remedied by order of the court or judge; and every warrant of the court to do any act or to take or keep any person in custody if in the form prescribed by the rules shall be deemed and taken to be good valid and sufficient in law. (pp. 21, 37, 44, 104, 149, *ante*).

**32.** All orders of the court office copies summonses and warrants shall be under the seal of the court and signed or certified by a chief clerk. (pp. 37, 40, 135, 201, *ante*). **SECS. 32-36.**

*Insolvency  
Statute 1871  
s. 32.*

**33.** When the court has power under this Act to sentence apprehend or commit any person to prison the commitment may be by warrant directed to such person as the court may think fit and to such convenient prison as the court thinks expedient, and every such warrant shall be sufficient authority to such person to act as therein directed and to the keeper of such prison to detain the person sentenced apprehended or committed for the period named in such warrant. (p. 27, *ante*).

*Orders &c. to be  
sealed and  
signed.*

*Commitment to  
prison.*

*Ib. s. 33.*

*See 32 & 33 Vict.  
c. 71 s. 77.*

### PART III.—VOLUNTARY SEQUESTRATIONS.

**34.** A judge or chief clerk, upon petition to the court in writing of any person setting forth that he is insolvent and desirous of surrendering his estate for the benefit of his creditors, may upon proof thereof to his satisfaction accept the surrender of such estate and by order under his hand place the same under sequestration in the hands of one of the assignees the costs of such sequestration shall when taxed be allowed and paid by the assignee or trustee out of such estate. (pp. 54, 71, *ante*).

*A judge or chief  
clerk may accept  
the surrender of  
the estate of any  
person by peti-  
tion declaring  
himself  
insolvent.*

*Ib. s. 34.*

**35.** A judge or chief clerk of the court may, upon the like petition of any person legally vested with the administration of the estate of any person deceased or with the estate of any other person situate in Victoria in trust for creditors stating the insolvency of such estate or upon the like petition stating the insolvency of the estate of any firm trading or having any estate or effects within Victoria made by the greater number of the partners of such firm who at the time of presenting the petition are within Victoria, upon proof thereof to his satisfaction accept the surrender of any such estate and place the same under sequestration in manner aforesaid; and after the order for any such sequestration the like proceedings shall and may be had and take place concerning such estates and the persons in whom the administration thereof is legally vested and the partner or partners of such firms as are herein provided concerning other estates and other insolvents. (pp. 74, 77, 78, 330, *ante*).

*Surrender by  
persons vested  
with the admin-  
istration of the  
estate of others.*

*Ib. s. 35.*

**36.** All petitions under this Part of this Act shall be presented to the judge or chief clerk of the court of the district in which the petitioner resides, or in the case of a firm to the judge or chief clerk of the court of any district in which such firm has traded or carried on business for the preceding six months or the longest period during such six months and except as by this Act otherwise provided all proceedings under the sequestration shall be prosecuted in such district. (p. 76, *ante*).

*District in  
which petition  
to be presented.*

*Ib. s. 36.*

## SEC. 37.

## PART IV.—COMPULSORY SEQUESTRATIONS.

*Insolvency  
Statute 1871  
s. 37.  
Acts of  
insolvency and  
what creditors  
may petition.  
See 32 & 33 Vict.  
c. 71 s. 6.*

37. A single creditor or two or more creditors, if the debt due to such single creditor or the aggregate amount of debts due to such several creditors from any debtor amount to a sum not less than Fifty pounds may present a petition to a judge of the Supreme Court or of the court praying that the estate of the debtor may be sequestrated for the benefit of his creditors, and alleging as the ground for such petition any one or more of the following acts or defaults, hereinafter deemed to be and included under the expression "acts of insolvency":—(pp. 81, 84, 95, 97, 102, 103, 105 to 132, *ante*).

Amended by s.  
106 Act of 1897.

- (I.) That the debtor has, in Victoria or elsewhere, made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally. (pp. 55, 105 to 109, *ante*).
- (II.) That the debtor has, in Victoria or elsewhere, made a conveyance gift delivery or transfer of his property or of any part thereof, with intent to defeat or delay his creditors. (pp. 109 to 113, 238, *ante*).
- (III.) That the debtor has, with intent to defeat or delay his creditors, done any of the following things, namely, departed out of Victoria, or being out of Victoria, remained out of Victoria, or departed from his dwelling-house or otherwise absented himself, or begun to keep house. (pp. 113 to 117, *ante*).
- (IV.) That the debtor has filed in the prescribed manner in the court a declaration admitting his inability to pay his debts. (pp. 79, 117, *ante*).
- (V.) That execution issued against the debtor on any legal process for the purpose of obtaining payment of not less than fifty pounds has been levied by seizure: unless such process be *bond fide* satisfied by payment or otherwise within four days from the seizure. Provided a petition for sequestration be presented within twelve days from the seizure. (pp. 47, 89, 118, *ante*).
- (VI.) That the creditor presenting the petition has served in the prescribed manner on the debtor a debtor's summons requiring the debtor to pay a sum due, of an amount of not less than fifty pounds, and the debtor has for the space of fourteen days succeeding the service of such summons neglected

to pay such sum or to secure or compound for the same. SEC. 37.  
(pp. 120 to 125, *ante*).

*Insolvency  
Statute 1871.*

See 24 & 25 Vict.  
c. 134 s. 75.

(VII.) That the debtor has been adjudged or declared bankrupt or insolvent by any British court out of Victoria having jurisdiction in bankruptcy or insolvency, and it shall not be necessary to produce any other evidence of such act of insolvency than a duly certified copy under the seal of the court of the order or adjudication by which such person was declared or adjudged bankrupt or insolvent. (p. 125, *ante*).

(VIII.) When execution or other process issued on a judgment decree or order obtained in any court in favour of any creditor in any proceeding instituted by such creditor is returned unsatisfied in whole or in part. Provided that the debtor has been called upon to satisfy such judgment decree or order by the officer or other person charged with the execution thereof and has failed to do so. (pp. 125 to 130, 138, 143, *ante*).

(IX.) If at any meeting of creditors a debtor shall consent to present a petition under Part III. of this Act for the sequestration of his estate, and such debtor shall not within forty-eight hours from the date of his consenting as aforesaid present such petition he shall be deemed to have committed an act of insolvency on the expiration of such time; and if at any meeting of creditors a debtor shall admit that he is in insolvent circumstances, and he shall be then requested by a resolution of the majority of the creditors present at such meeting to surrender his estate under Part III. of this Act, and such debtor shall refuse, he shall thereby be deemed to have committed an act of insolvency. (pp. 130 to 132, 153, 160, *ante*).

X.) That the debtor has given or made any preference to or in favour of any creditor which would if the estate of such debtor were sequestrated under this Act be a fraudulent preference of such creditor. (pp. 132, 238, *ante*).

But no person shall be adjudged an insolvent on any of the above grounds unless the act of insolvency on which the adjudication is grounded has occurred within six months before the presentation of the petition for sequestration; moreover, the debt of the petitioning creditor must be a liquidated sum due at law or in equity, and must not be a secured debt unless the petitioner state in his petition that he

Amended by a.  
106 Act of 1897.

**SECS. 37-39.**

*Insolvency  
Statute 1871.*

will be ready to give up such security for the benefit of the creditors after adjudication of sequestration or unless the petitioner is willing to give an estimate of the value of his security, in which latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated, but he shall on an application being made by the trustee within the prescribed time after adjudication of sequestration give up his security to such trustee for the benefit of the creditors upon payment of such estimated value. (pp. 85, 96, 100, 110, *ante*).

Proceedings in  
relation to a  
debtor's  
summons.

*Ib. s. 38.*

See 32 & 33 Vict.  
c. 71 s. 7.

**38.** A debtor's summons may be granted by the court on a creditor proving to its satisfaction that a debt sufficient to support a petition for sequestration is due to him from the person against whom the summons is sought, and that the creditor has failed to obtain payment of his debt after using reasonable efforts to do so. The summons shall be in the prescribed form. It shall state that in the event of the debtor failing to pay the sum specified in the summons, or to compound for the same to the satisfaction of the creditor, a petition may be presented against him praying that his estate may be sequestrated. The summons shall have an endorsement thereon to the like effect, or such other prescribed endorsement as may be best calculated to indicate to the debtor the nature of the document served upon him, and the consequences of inattention to the requisitions therein made. Any debtor served with a debtor's summons may apply to the court, in the prescribed manner and within the prescribed time, to dismiss such summons on the ground that he is not indebted to the creditor serving such summons, or that he is not indebted to such amount as will justify such creditor in presenting petition for sequestration against him; and the court may dismiss the summons, with or without costs, if satisfied with the allegations made by the debtor, or it may, upon such security (if any) being given as the court may require for payment to the creditor of the debt alleged by him to be due and the costs of establishing such debt, stay all proceedings on the summons for such time as will be required for the trial of the question relating to such debt. (pp. 120, 123, 124, *ante*).

Sequestration  
upon petition of  
creditor against  
an insolvent  
person.

*Ib. s. 39.*

See *ib. s. 8.*

**39.** Any judge of the Supreme Court or of the court may upon petition against any person having committed an act of insolvency by any creditor or creditors whose debt or debts amount to the value hereinbefore provided, and setting forth the amount of the debt or debts of such creditor or creditors and the cause thereof and the alleged act of insolvency and praying that the estate of such person may be sequestrated for the benefit of his creditors, upon proof thereof to his satisfaction by order *nisi* under his hand place the estate of such person

under sequestration in the hands of one of the assignees until the said order *nisi* shall be made absolute or be discharged in manner hereinafter mentioned : and every such order *nisi* shall name a time when cause may be shown before the Supreme Court against the same being made absolute, and the Supreme Court may enlarge such order *nisi* from time to time as it may deem necessary. (pp. 95, 132, 133, 134, 147, *ante*).

SECS. 39-42.

*Insolvency  
Statute 1871.*

40. The creditor on whose petition any order *nisi* for sequestration shall be made shall at his own cost prosecute all the proceedings in the sequestration until after the close of the meeting for the election of trustee ; and (the same having been first taxed) the assignee or trustee shall reimburse the said creditor out of the first money which shall be received ; and the costs incurred under any sequestration shall be paid out of the insolvent estate. (pp. 54, 55, 147, 316, *ante*).

Costs of  
sequestration.  
*Ib. s. 40.*

41. Any creditor of a firm may in like manner as aforesaid petition against all or any one or more of the partners of such firm to have the estate of such firm placed under sequestration, provided any such partner has committed an act of insolvency whereby the creditors of such firm may be defeated or delayed in obtaining payment of the debts due by such firm ; and every order for sequestration issued upon such petition shall be valid although it do not include all the partners of the firm ; and after the order for sequestration of any such estate is made, the like proceedings shall and may be had and take place concerning such estate and such partner or partners as are herein provided to be had and take place concerning other estates and other insolvents. Provided always that nothing herein contained shall extend or be construed to prevent the creditor of any firm from proceeding against any partner or the separate estate of any partner thereof in respect of debts due by such firm in the same way in which it is herein provided that the creditor of any person may proceed against him and his estate in respect of debts due by such person in his individual capacity. (p. 92, *ante*).

Sequestration  
of the estate of  
a firm.  
*Ib. s. 41.*  
See 32 & 33 Vict.  
c. 71 s. 100.  
Affected by s.  
109 Act of 1897.Proceedings  
against the  
separate estate  
of partners.

42. Any creditor of the estate of any person deceased may in like manner as aforesaid petition to have such estate placed under sequestration as insolvent, provided the person in whom the administration of such estate is legally vested has committed an act of insolvency whereby the creditors of such estate may be defeated or delayed in obtaining payment of the debts due by such estate, and after the order for any such sequestration is made, the like proceedings shall and may be had and take place concerning such estates and the person in whom

Sequestration  
of estates of  
deceased persons  
in certain cases.  
*Ib. s. 42.*  
Affected by s.  
113 Act of 1897.

**SECS. 42-46.** the administration thereof is legally vested as are herein provided to be had and take place concerning other estates and other insolvents. (p. 94, *ante*).

*Insolvency  
Statute 1871.*

Order nisi.  
*Ib. s. 43.*

**43.** Every order *nisi* under this Part of this Act shall set out the nature and amount of the petitioning creditor's debt and the act or acts of insolvency relied on. (p. 133, *ante*).

Service of order  
*nisi.*  
*Ib. s. 44.*

**44.** Every order *nisi* under this Part of this Act and any order enlarging the same shall be served personally on the respondent by delivering to him an office copy thereof unless it be proved to the satisfaction of a judge of the Supreme Court or of the court that the respondent is keeping out of the way to avoid service or has left Victoria, in which case such judge may order that service of an office copy of the order *nisi* or any order enlarging the same at the usual or last-known place of abode or business of the respondent by delivering the same to some adult person resident thereat or if such person will not receive the same or if there be no such person by affixing such copy upon some conspicuous place upon the premises shall be deemed good service upon the respondent, and the judge may by such or any other order fix a time within which the respondent may file or post a notice of objections. (pp. 136, 137, *ante*).

Notice of  
intention to  
oppose petition.  
*Ib. s. 45.*

**45.** Every respondent shall if he intends to oppose the order *nisi* being made absolute within four days after service of the order *nisi* or such further time as a judge of the Supreme Court may appoint file in the office of the associate of such one of the judges as they may by a rule appoint when the residence of such respondent is within twenty miles of Melbourne or when it is at a greater distance shall within the said time put into the nearest post office addressed to the said associate a notice in writing signed by him of such his intention, and such notice shall state whether he disputes the act of insolvency or the petitioning creditor's debt or both, and if he intends to rely on any special defence such notice shall contain the particulars of any such defence and such notice shall be a waiver of all technical objections to the proceedings. (pp. 47, 139, 141, 143, *ante*).

If order not  
duly served.  
*Ib. s. 46.*

**46.** Upon the hearing of any such petition if the respondent appear merely for the purpose of objecting that the order *nisi* has not been duly served and it shall appear to the Supreme Court that such order *nisi* has not been duly served the order *nisi* shall not be discharged, but the said court may adjourn the hearing thereof subject to such directions and upon such terms as to costs or otherwise as to the said court may seem just. (pp. 57, 144, *ante*).



47. Upon the day named in the order *nisi* or on the day to which SECS. 47-49. such order shall have been finally enlarged, the Supreme Court may Insolvency  
Statute 1871  
s. 47. adjudge and finally determine thereon or postpone the adjudication and determination for such time as it may think fit; and upon the hearing of an order *nisi* if the respondent do not appear, or if the respondent appear and no notice of opposition has been given, the said order *nisi* may be made absolute and the estate be adjudged to be sequestrated upon an affidavit of service of the order *nisi*; but if the respondent appear and notice of opposition has been given the proceedings upon the hearing shall be conducted in the same manner as nearly as may be as upon a trial at law and the order *nisi* may be made absolute or discharged with or without costs as may be just; and whenever any such order *nisi* shall be discharged by the said court, all questions affecting the property of the respondent or the validity of any transaction deed act matter or thing relating thereto shall be determined as if such order *nisi* had never been made. When an order *nisi* is made absolute the associate shall forward the order absolute to the chief clerk. (pp. 55, 56, 98, 144, *ante*).

The Supreme Court to make order absolute or discharge the same and effect thereof.

48. If it shall appear to the Supreme Court upon the hearing of the order *nisi* that the petition for sequestration was unfounded and vexatious or malicious, the said court may allow the respondent on his application for the same, then or at some other time to be named by the said court, to prove any damage alleged to have been by him sustained thereby; and may award to the respondent such damage not exceeding Two hundred and fifty pounds as the said court shall deem fit, and compel payment thereof by summary process or leave the said party to his action for the said injury. (p. 146, *ante*).

If petition unfounded or malicious.  
Ib. s. 48.

49. If after any order *nisi* has been made for the sequestration of an estate, the debt of the petitioning creditor be found insufficient to entitle such creditor to apply for and obtain such order *nisi*, or if such order *nisi* shall be discharged or allowed to lapse in consequence of the consent or default of the petitioning creditor or his collusion with the insolvent, the Supreme Court or any judge thereof or of the court may upon the application of any other creditor whose debt amounts to the value hereinbefore provided and has been incurred prior to the order *nisi*, and upon proof thereof to the satisfaction of the said court or judge, order that the said sequestration shall be revived and be proceeded in as if it had been originally obtained on the petition of the last-mentioned creditor; and thereafter the said sequestration shall be revived with all the consequences and effects thereof as if the order *nisi*

Sequestration revived by other creditor and effect of though superseded as to original petitioning creditor.  
Ib. s. 49.

Affected by ss. 107 and 108 Act of 1897.

**SECS. 49-53.** had not been discharged or allowed to lapse. (pp. 57, 98, 135, 148, 149, 150, *ante*).

*Insolvency  
Statute 1871.*

As to payments  
&c. or security  
from insolvent  
to petitioning  
creditor after  
order for  
sequestration.  
*Ib. s. 50.*

**50.** If any person against whom an order *nisi* for sequestration has been made shall pay any money to the person who obtained the same or any one on his behalf or give or deliver to any such person any satisfaction or security for his debt or any part thereof, such payment gift delivery satisfaction or security shall be a new act of insolvency upon which a petition for sequestration may be presented; and every person so receiving such money gift delivery satisfaction or security shall deliver up such security and shall repay or deliver the said money or gift or the full value thereof to the assignee or trustee of the insolvent estate for the benefit of the creditors of such insolvent, and shall pay all the costs which shall be incurred by any other creditor in obtaining the revival of the sequestration. (pp. 57, 82, 135, 150, *ante*).

Endorsement  
on petition.  
*Ib. s. 51.*

**51.** Every petition under this Part of this Act shall have endorsed thereon the district in which the respondent resides, or in the case of a firm any district in which such firm has traded or carried on business during the preceding six months or the longest period during such six months; and except as by this Act otherwise provided all proceedings under the sequestration shall be prosecuted in such district. The absence of any such endorsement as aforesaid shall not be deemed to render the order *nisi* invalid or to affect the jurisdiction to make such order absolute. (pp. 103, 104, *ante*).

## PART V.—ADMINISTRATION OF ESTATE.

### DIVISION 1.—ASSIGNEES AND TRUSTEES; THEIR APPOINTMENT AND ELECTION.

Assignees.  
*Ib. s. 52.*

**52.** The Governor in Council may appoint such number of fit persons to be and be called assignees of insolvent estates as may be from time to time required. The present official assignees shall be the assignees under this Act, and any of such persons or assignees the Governor in Council may remove. The assignees shall give such security as the Governor in Council may from time to time direct, and shall be officers of the court and subject to its orders, and the court may at all times summon the assignees and examine them on oath and require them to produce all books papers deeds and documents relating to insolvent estates in their possession. (pp. 163, *ante*).

Appointment  
and notice of  
meeting of  
creditors for  
election of  
trustee.

**53.** The chief clerk shall after sequestration under Part III. of this Act or adjudication of sequestration forthwith cause notice thereof to be given in the *Government Gazette*, or in any mode prescribed by the

rules, and shall thereby appoint a time and place for a general meeting of the creditors of such estate, and the creditors assembled at such meeting shall and may do as follows :—(p. 154, *ante*).

*Insolvency  
Statute 1871  
s. 53.*

*See 32 & 33 Vict.  
c. 71 s. 14.  
Act No. 411 s. 5.*

(i.) They may by resolution appoint some fit person or persons, not exceeding two, whether creditors or not, to fill the office of trustee of the property of the insolvent at such remuneration (if any) as the creditors may from time to time determine ; or they may resolve to leave his appointment to the committee of inspection hereinafter mentioned : (pp. 63, 157, 169, 198, 317 *ante*).

(ii.) They may when they appoint a trustee, by resolution declare what security is to be given, and to whom, by the person so appointed before he enters on the office of trustee :

iii.) They may by resolution appoint some other fit persons not exceeding five in number, and being creditors qualified to vote at a general meeting of creditors as is in this Act mentioned or authorized in the prescribed form by creditors so qualified to vote, to form a committee of inspection for the purpose of superintending the administration by the trustee of the insolvent's property : (pp. 157, 195, 197, *ante*).

*Amended by s.  
64 (A) Act of  
1897.*

(iv.) They may by resolution give directions as to the manner in which the property is to be administered by the trustee ; and it shall be the duty of the trustee to conform to such directions, unless the court for some just cause otherwise orders. (pp. 157, 177, *ante*).

*Vide s. 64 (B) Act  
of 1897 for  
additions.*

54. The assignees shall be remunerated in manner following (that is to say) :—

*Assignees'  
remuneration.  
Insolvency  
Statute 1871  
s. 54.*

(i.) If a trustee be elected by the creditors or appointed by the committee of inspection such trustee shall pay to the assignee for his own use and benefit in addition to such costs charges and expenses as may be allowed by the court or judge for the interim management of the estate the sum of five pounds when the gross assets do not exceed two hundred pounds in value and ten pounds when the assets exceed two hundred pounds. (pp. 54, 62, 317, *ante*).

(ii.) If no trustee be elected or appointed the assignee shall receive such remuneration as the creditors shall at a meeting decide,

**SECS. 54-59.**

*Insolvency  
Statute 1871.*

Confirmation of  
trustee.

*Ib. s. 55.*

See 32 & 33 Vict.  
c. 71 s. 18.

**Repealed.**

*Vide s. 17 Act of  
1897.*

Notice by  
trustee on his  
appointment.

**Repealed.**

*Vide s. 17 Act of  
1897.*

If no trustee  
confirmed  
assignee to be  
deemed to be  
trustee.

*Act No. 411 s. 6.*

Removal of  
assignee or  
trustee.

*Insolvency  
Statute 1871 s. 56.*

See *ib. s. 83 (4).*

**Repealed.**

*Vide s. 30 Act of  
1897.*

As to resignation  
and discharge of  
assignee or  
trustee.

*Ib. s. 57.*

or failing such meeting as the court award, not exceeding five pounds per centum on the gross assets of the estate. (p. 62, *ante*).

**55.** *The judge or chief clerk may upon the acceptance in writing of office by the trustee and upon being satisfied that the requisite security (if any) has been given make an order confirming his election or appointment.*

*Every trustee on being confirmed shall forthwith cause notice thereof to be given in the Government Gazette, and the chief clerk shall cause notice of every order made for the removal of any assignee or trustee to be given by advertisement in the Government Gazette.*

**56.** If no trustee be confirmed the assignee for the time being shall be deemed to be the trustee and wherever in this Act the word trustee is used the same shall apply to an assignee if no trustee be confirmed. (p. 172, *ante*).

**57.** *The court may remove the assignee or trustee of an insolvent estate for insolvency absence from Victoria or for any misconduct in his office as assignee or trustee and upon the death resignation refusal to act or removal of the assignee or trustee of an estate shall appoint another assignee or order the election of a new trustee and the same proceedings shall be had thereon as on the original election.* (p. 172, *ante*).

**58.** If an assignee or trustee desire to resign his office he may apply to the court for leave and if no valid objection be stated and if the court be satisfied that he has complied with the provisions of this Act and with the rules his application may be granted by the court; but if any objection be stated thereto, the court shall proceed to determine the same and shall make such order thereon as it shall deem fit; and if the application of the assignee or trustee for leave to resign be granted the court may make such orders as may be necessary for the preservation and administration of the estate until a new assignee or trustee be appointed or elected and confirmed and for the discharge and acquittance of the said assignee or trustee and for the security and payment of any unclaimed dividends to the parties entitled to the same. Provided always that no order of the court allowing an assignee or trustee to resign shall prevent the assignee or trustee thereafter appointed or elected and confirmed in his stead from calling upon him to account as assignee or trustee prior to his resignation. (p. 175, *ante*).

#### DIVISION 2.—VESTING AND REALIZATION OF ESTATE.

Order of seques-  
tration shall vest

**59.** Every order placing an estate under sequestration in the hands

of an assignee shall vest in such assignee absolutely the property of the insolvent of or to which he is then seised possessed or entitled or of or to which he may become seised possessed or entitled before he obtains his certificate under this Act. (pp. 201, 204, 213, 217, 263, *ante*).

SECS. 59-64.

*Insolvency  
Statute 1871  
s. 58.*

in assignee the  
property of an  
insolvent.

See 32 & 33 Vict.  
c. 71 s. 17.

Where estate  
vested in  
trustees  
sequestrated.

*Ib.* s. 59.

*Act No.* 411 s. 2.

**60.** Where an estate is sequestrated of which a trustee has been appointed under Part IX. of this Act such trustee shall be appointed by the order or order *nisi* for sequestration instead of an assignee, and the property of the debtor both present and future shall vest in such trustees in the same manner as if they were assignees appointed under this Act, and such trustees shall have all the duties powers rights and liabilities of a trustee duly confirmed. (pp. 157, 202, *ante*).

**61.** The order of the court confirming the election or appointment of a trustee shall divest the assignee and shall vest the insolvent estate in such trustee, and the order confirming the election or appointment of any trustee or a copy thereof signed by a judge or chief clerk and certified by such judge or chief clerk to be a copy thereof shall be received and taken by all courts of justice in Victoria as conclusive evidence that such trustee has been duly elected or appointed and confirmed. (pp. 32, 172, 201, *ante*).

Order of court  
confirming  
election of  
trustee shall  
divest official  
assignee.

*Insolvency  
Statute 1871  
s. 60.*

See *ib.* s. 17.

**62.** The order of a judge or chief clerk confirming the election or appointment of a trustee shall be drawn up as and be deemed to be an order of the court. (pp. 172, 201, *ante*).

Order of a judge  
or chief clerk to  
be deemed an  
order of the  
court.

*Act No.* 411 s. 3.

**63.** Whenever on the death resignation or removal of any assignee or trustee any assignee or new trustee shall be appointed or elected and confirmed in manner hereinbefore provided, the order appointing the new assignee or confirming the election or appointment of such new trustee shall vest in the new assignee or trustee as the case may be the whole of the insolvent estate, and every power right title privilege and remedy vested in or competent to the former assignee or trustee as such assignee or trustee before his death resignation or removal as fully and to the same extent as the same was vested in the former assignee or trustee by the order appointing him or confirming his election or appointment, and the death resignation or removal of any assignee or trustee shall not affect the validity of any lawful act done by him as assignee or trustee prior to his death resignation or removal. (pp. 170, 172, 203, *ante*).

Effect of order  
for confirmation  
of new trustee.

*Insolvency  
Statute 1871  
s. 61.*

See *ib.* s. 33 (6).

**64.** The following regulations shall be made with respect to the trustee and committee of inspection :—

Regulations as  
to trustees, &c.

*Ib.* s. 62.

See *ib.* s. 83.

(1.) The creditors may when two trustees are appointed declare

## SEC. 64.

*Insolvency  
Statute 1871.*

Amended by  
s. 28 Act of 1897.

whether any act required or authorised to be done by the trustee is to be done by both or one of such persons ; but both such persons are in this Act included under the term "trustee," and shall be joint tenants of the insolvent estate. No person dealing with any trustee or trustees under this Act shall be bound to inquire whether such trustee or trustees has or have been required or authorized to do any particular act or whether the sanction of a meeting of creditors or of the committee of inspection has been obtained as required by this Act but the trustee shall not be exonerated if he omit to comply with any of the provisions of this Act. The creditors may also elect persons to act as trustees in succession in the event of one or more of the persons first named declining to accept the office of trustee: (pp. 157, 158, 169, 177, 185, 186, *ante*).

- (II.) If through any cause whatever there should be no trustee the court or judge may appoint an assignee to act as such trustee :
- (III.) If any vacancy occur in the office of trustee by death resignation or otherwise, the creditors in general meeting may fill up such vacancy, and a general meeting for the purpose of filling up such vacancy may be convened by the continuing trustee if there be more than one, or by the chief clerk on the requisition of any creditor :
- (IV.) If the estate of a trustee be sequestrated he shall cease to be trustee, and the chief clerk shall if there be no other trustee call a meeting of creditors for the election of another trustee in his place : (pp. 173, 352, *ante*).
- (V.) The trustee of an insolvent may sue and be sued by the official name of "the trustee of the property of an insolvent," inserting the name of the insolvent, and by that name may hold property of every description, make contracts, sue and be sued, enter into any engagements binding upon himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office : (p. 181, *ante*).
- (VI.) Any member of the committee of inspection may resign his office by notice in writing signed by him and delivered to the trustee : (p. 196, *ante*).

(vii.) The creditors may by resolution fix the quorum required to be present at a meeting of the committee of inspection : SECS. 64-65.  
 (pp. 157, 195, *ante*). *Insolvency*  
*Statute 1871.*

(viii.) Any member of the committee of inspection may be removed by an ordinary resolution at any meeting of creditors of which the prescribed notice has been given, stating the object of the meeting : (p. 196, *ante*).

(ix.) On any vacancy occurring in the office of a member of the committee of inspection by removal death resignation or otherwise, the trustees shall convene a meeting of creditors for the purpose of filling up such vacancy : (p. 197, *ante*).

(x.) The continuing members of the committee of inspection may act, notwithstanding any vacancy in their body ; and where the number of members of the committee of inspection is for the time being less than five, the creditors may increase that number so that it do not exceed five : (p. 197, *ante*).

(xi.) No defect or irregularity in the election of a trustee or of a member of the committee of inspection shall vitiate any act *bona fide* done by him ; and no act or proceeding of the trustee or of the creditors shall be invalid by reason of any failure of the creditors to elect all or any members of the committee of inspection : (pp. 169, 170, 197, *ante*).

(xii.) If a member of the committee of inspection become an insolvent his office shall thereupon become vacant : (pp. 197, 352, *ante*).

(xiii.) Where there is no committee of inspection, any act or thing or any direction or consent by this Act authorized or required to be done or given by such committee may be done or given by the court or a judge on the application of the trustee. (p. 197, *ante*).

**65.** The assignee or trustee of an insolvent estate may by his messenger authorized by warrant under his hand seize and lay an attachment on the insolvent estate and make an inventory thereof. Attachment of  
estate.  
*Ib. s. 63.*

The messenger making such attachment shall leave with the person in whose possession any such property is attached a copy of the warrant under the seal of the court together with a copy of the said inventory, having subjoined thereto a notice that the property of the insolvent has been attached by the said messenger, and that any person who knowing the same to have been so attached shall dispose of remove

**SECS. 65-67.** retain embezzle conceal or receive the same or any part thereof with intent to defeat the said attachment is liable on conviction of such offence to be imprisoned with or without hard labour for any period not exceeding three years. The messenger may secure on the premises by sealing up any repository room or closet any articles which in the discharge of his duty it shall seem to him expedient so to secure or may leave some person on the premises in custody thereof. (pp. 37, 38, 164, 165, *ante*).

*Insolvency  
Statute 1871.*

Seizure of  
property of  
insolvent.  
*Ib. s. 64.*  
32 & 33 Vict.  
c. 71 s. 99.

**66.** Any person acting under warrant of the court may seize any property of the insolvent divisible amongst his creditors under this Act and in the insolvent's custody or possession or in that of any other person, and with a view to such seizure may break open any house building or room of the insolvent where the insolvent is supposed to be, or any building or receptacle of the insolvent where any of his property is supposed to be ; and where the court or judge is satisfied that there is reason to believe that property of the insolvent is concealed in a house or place not belonging to him, the court or judge may grant a search warrant to any constable or prescribed officer of the court, who may execute the same according to the tenor thereof. (pp. 38, 165, *ante*).

Regulations as  
to meetings of  
creditors.

*Ib. s. 65.*

See *ib. s. 16.*

Affected by ss.  
120 to 124 Act  
of 1897.

**67.** General meetings of creditors shall be held in the prescribed manner and subject to the prescribed regulations as to the quorum, adjournment of meeting, and all other matters relating to the conduct of the meeting or the proceedings thereat. (p. 155, *ante*). Provided that—

- (I.) The meeting shall be presided over by the chief clerk, or by such chairman as the meeting may elect :
- (II.) A person shall not be entitled to vote as a creditor unless at or previously to the meeting he has in the prescribed manner proved a debt provable under the insolvency to be due to him : (p. 160, *ante*).
- (III.) A creditor shall not vote at the said meeting in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained : (p. 161, *ante*).
- (IV.) A secured creditor shall, for the purpose of voting, be deemed to be a creditor only in respect of the balance (if any) due to him after deducting the value of his security ; and the amount of such balance shall, until the security be realized, be determined in the prescribed manner. He may however



at or previously to the meeting of creditors give up the security to the trustee, and thereupon he shall rank as a creditor in respect of the whole sum due to him : (pp. 161, 308, *ante*). SECS. 67-68. Insolvency Statute 1871.

(v.) A "secured creditor" shall in this Act mean any creditor holding any mortgage charge or lien on the insolvent estate or any part thereof as security for a debt due to him : (pp. 161, 291, 307, 308, *ante*).

(vi.) Votes may be given either personally or by proxy : (p. 158, *ante*).

(vii.) An ordinary resolution shall be decided by a majority in value of the creditors present personally or by proxy at the meeting and voting on such resolution : (p. 163, *ante*).

(viii.) A resolution of creditors under this Act shall unless otherwise provided mean an ordinary resolution : (p. 163, *ante*).

(ix.) A special resolution shall be decided by a majority in number and three-fourths in value of the creditors present personally or by proxy at the meeting and voting on such resolution : (p. 163, *ante*).

(x.) The assignee or trustee may at any time call a general meeting of the creditors and shall call such meeting when required by one-fourth in value of the creditors who have proved their debts. The minutes of general meetings of creditors upon proof of the signature of the person presiding at such meeting shall be *prima facie* evidence in all courts of justice of what passed at such meeting. (pp. 32, 155, *ante*). See 32 & 33 Vict. c. 71 s. 20.

**68.** The assignee until the confirmation of a trustee shall as nearly as may be preserve the estate in the same condition as it is at the date of the order or order *nisi* for sequestration. Provided that with the sanction of a judge or the creditors at a meeting the assignee may realize or take proceedings to recover any portion of the insolvent estate. Duties of assignee. *Ib.* s. 66.

If no trustee be confirmed the duties powers rights and liabilities of the assignee of an insolvent estate shall be the same (except as by this Act otherwise expressly provided) as those of a trustee confirmed by the court, and whenever in this Act any powers rights duties or liabilities are conferred or imposed upon a trustee such powers rights duties and liabilities shall be deemed to be conferred and imposed upon an assignee if no trustee be confirmed. (pp. 164, 166, *ante*). General duties of assignee.

**SECS. 69-70.**

*Insolvency  
Statute 1871  
s. 67.*

General duties  
of trustee.

See 32 & 33 Vict.  
c. 71 s. 20.

**69.** The trustee shall after the order confirming his election or appointment has been made collect get in sell and dispose of the whole of the insolvent estate in such manner and at such times as he may think proper subject nevertheless to the provisions of this Act and the directions of the creditors at a general meeting or of the committee of inspection ; but the directions of the creditors at a general meeting shall override those of the committee of inspection. (pp. 157, 177, 179, 197, *ante*).

Descriptions of  
insolvent's pro-  
perty divisible  
amongst  
creditors.

*Ib. s. 68.*

See *ib. s. 15.*

**70.** The property of the insolvent divisible amongst his creditors shall not comprise the following particulars :—

(I.) Property held by the insolvent on trust for any other person :  
(p. 250, *ante*).

(II.) The tools (if any) of his trade, and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding twenty pounds in the whole ; but the creditors may by resolution at a general meeting direct that the whole or such part as they may think fit of the tools of trade furniture and wearing apparel of the insolvent his wife and children be granted to the insolvent. (pp. 250, 346, *ante*).

But it shall comprise the following particulars :—(p. 263, *ante*).

(III.) All such property as may belong to or be vested in the insolvent at the date of the order of sequestration or may be acquired by or devolve on him before he obtains his certificate. (p. 213, *ante*).

(IV.) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit. (p. 240, *ante*).

(V.) All goods and chattels being at the date of the sequestration in the possession order or disposition of the insolvent by the consent and permission of the true owner of which goods and chattels the insolvent is reputed owner, or of which he has taken upon himself the sale or disposition as owner ; provided that things in action, other than debts due to him in the course of his trade or business, shall not be deemed goods or chattels within the meaning of this sub-section. (pp. 217, 241 to 249, *ante*).

**71.** Every conveyance assignment gift delivery or transfer of any property which would under this Act be deemed to be an act of insolvency shall be and is hereby declared to be absolutely void against the assignee or trustee appointed or elected under this Act but in the case of a conveyance or assignment of all the debtor's property for the benefit of all his creditors all dealings with such property and all acts and things *bonâ fide* made or done by the trustee of such conveyance or assignment shall be valid and not affected by the sequestration unless the trustee had before or at the time of any such dealings acts or things notice that proceedings had been or were about to be taken to sequester the estate of the debtor. (pp. 110, 217, 220, *ante*).

**SECS. 71-73.**  
*Insolvency Statute 1871 s. 69.*  
 All conveyances &c. which are acts of insolvency void against trustee.  
 Assignments for benefit of creditors protected.

**72.** Any settlement of property not being a settlement made before and in consideration of marriage or *bonâ fide* in pursuance of an antenuptial contract, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes insolvent within two years after the date of such settlement, be void as against the assignee or trustee of the insolvent estate under this Act, and shall, if the settlor becomes insolvent at any subsequent time within five years after the date of such settlement, unless the parties claiming under such settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement, be void against such assignee or trustee. Any covenant or contract made in consideration of marriage, for the future settlement upon or for his wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder and not being money or property of or in right of his wife, shall upon his becoming insolvent before such property or money has been actually transferred or paid pursuant to such contract or covenant, be void against his assignee or trustee appointed under this Act. "Settlement" shall for the purposes of this section include any conveyance or transfer of property. (pp. 5, 217, 220 to 230, *ante*).

Avoidance of voluntary settlements.  
*Ib.* s. 70.  
 See 32 & 33 Vict. c. 71 s. 91.  
 Affected by Part VIII. Act of 1897.

**73.** Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and ever judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own moneys in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors shall, if the person making taking paying or suffering the same become insolvent within three months

Avoidance of fraudulent preferences.  
*Ib.* s. 71.  
 See *ib.* s. 92.  
 Amended by s. 116 Act of 1897.

**SECS. 73-76.** after the date of making taking paying or suffering the same, be deemed a fraudulent preference and fraudulent and void as against the assignee or trustee of the insolvent appointed or elected under this Act; but this section shall not affect the rights of a purchaser payee or incumbrancer in good faith and for valuable consideration. (pp. 110, 217, 232 to 239, *ante*).

Protection of  
certain  
transactions  
with insolvent.  
*Ib.* s. 72.  
See 32 & 33 Vict.  
c. 71 s. 94.

**74.** Nothing in this Act contained shall render invalid—(p. 239, *ante*).

(I.) Any payment made in good faith and for value received to any insolvent before the date of the order of sequestration :

(II.) Any payment or delivery of money or goods belonging to an insolvent, made in good faith to such insolvent by a depository of such money or goods before the date of the order of sequestration :

(III.) Any contract or dealing with any insolvent, made in good faith and for valuable consideration, before the date of the order of sequestration. (p. 240, *ante*).

Alienation &c.  
after  
sequestration  
void.  
*Ib.* s. 73.

**75.** All warrants of attorney and *cognovits actionem* alienations transfers gifts surrenders deliveries bills of sale mortgages or pledges of any property made by an insolvent after sequestration and before he shall have obtained his certificate shall be and are hereby declared to be fraudulent and absolutely void. (p. 217, *ante*).

Effect of the  
order of  
sequestration  
upon  
judgments.  
*Ib.* s. 74.  
See *ib.* s. 87.

**76.** No sale shall take place by a sheriff or any county court bailiff of any property under any judgment or process for the sum of Fifty pounds or upwards until after eight days from the seizure or attachment thereof and if such property be sold the sheriff or bailiff shall retain the proceeds for four days after the sale and if a sequestration of the debtor's estate be made within such time the sheriff or bailiff shall hand over such proceeds to the assignee or trustee to be dealt with by him as part of the insolvent estate but if no such sequestration takes place such sheriff or bailiff shall pay the proceeds to the judgment creditor, and further execution of any judgment or process against the person or property of an insolvent shall after an order of sequestration of such estate has been made be stayed; and the person having right to such judgment may prove his debt against the insolvent estate; and where any property has been seized or attached by legal process and has not been sold, such property shall be placed under sequestration in the same manner as any other part of the insolvent estate. (pp. 79, 120, 269, 270, 307, 346, *ante*).

**77.** No action shall be brought against an insolvent for a debt provable in insolvency and all proceedings in any action then pending shall upon an order of sequestration being made be stayed; and the plaintiff in such action may prove his debt together with the taxed costs of it then incurred against the insolvent estate; but any creditor who shall be prevented by the sequestration of the debtor's estate from proceeding to sell under an execution levied before the order of sequestration was made shall be entitled to be paid his taxed costs incurred in the action suit or other proceeding under which such execution issued out of the proceeds of the insolvent estate, but no such payment shall exceed Fifty pounds; and all actions pending against any insolvent for damages alleged to have been sustained from any injury or wrong or breach of any contract committed by him (such damages being uncertain) or for recovery of any claim unliquidated as to its amount and all proceedings therein shall upon any order being made for the sequestration of his estate be stayed; and the plaintiff in such action after summoning the assignee or trustee to take up and defend the said action may proceed to obtain the judgment of the court thereon; and the said judgment when recovered together with the taxed costs of suit shall be a debt provable against the said estate. (pp. 60, 78, 267, 269, 289, 304, 307, 399, *ante*).

SECS. 77-80.

*Insolvency Statute 1871*  
s. 75.Effect of  
sequestration  
upon actions  
against  
insolvent.Costs of execu-  
tion creditor.

**78.** An insolvent who shall be in custody of the sheriff or of any gaoler or officer either under *mesne* process or in execution on any judgment decree or order for any debt or demand provable in insolvency shall be entitled to be on the order of a judge and shall be forthwith discharged out of custody in respect thereof, either absolutely or on such condition as such judge shall think fit to impose. (p. 347, *ante*).

Effect of order  
of sequestration  
on insolvent in  
custody under  
legal process.*Ib.* s. 76.

**79.** All actions commenced by an insolvent before sequestration for any debt or demand, and all proceedings therein, shall upon the order of sequestration being made be stayed until the assignee or trustee shall make election to prosecute or discontinue the same; and he shall make such election within six weeks after notice shall be served upon him by any defendant in any such action or otherwise shall be deemed to have abandoned the same. Provided however that an insolvent may continue in his own name and for his own benefit any action commenced by him before sequestration for any personal injury or wrong done to himself or to any of his family. (pp. 252, 265, 266, *ante*).

Effect of the  
order of  
sequestration  
upon action  
commenced by  
insolvent.*Ib.* s. 77.See 15 & 16 Vict.  
c. 70 s. 142.

**80.** The trustee may upon entering on the record a suggestion of the sequestration take up and continue in his own name the process in any suit or action to which the insolvent may be a party or ~~discontinue~~ the

Actions by or  
against trustees.  
*Ib.* s. 78.

**SECS. 80-83.** same as he shall see fit, and also on entering a like suggestion defend any suit or action pending against the insolvent relating to or affecting the insolvent estate. (p. 181, *ante*).

*Insolvency  
Statute 1871.*

Whenever an assignee or trustee shall resign be removed or die or a new assignee or trustee shall be appointed or elected and confirmed no suit or action relative to the insolvent estate shall be thereby abated ; but the court in which any such suit or action is depending or any judge thereof may, upon the suggestion of such resignation death or removal, and that a new assignee or trustee has been appointed or elected and confirmed, allow the name of the new assignee or trustee to be substituted in the place of the former ; and the said suit or action shall proceed as if such new assignee or trustee had originally commenced or defended the same. (pp. 174, 182, 266, *ante*).

The trustee may take advice on any legal question affecting the insolvent estate or the administration thereof, and may employ an attorney or solicitor to commence conduct or defend actions and suits or any other proceedings for or against the insolvent estate, and may charge against such estate all fees allowed upon taxation by the proper officer. (pp. 66, 181, *ante*).

Possession of  
property by  
trustee.

*Ib. s. 70.  
32 & 33 Vict.  
c. 71 s. 22.*

**81.** Where any portion of the property of the insolvent consists of stock shares in ships shares or any other property transferable in the books of any company office or person, the right to transfer such property shall be absolutely vested in the trustee to the same extent as the insolvent might have exercised the same if he had not become insolvent. (pp. 184, 209, *ante*).

Trustee to keep  
books.

*Ib. s. 80.*

**82.** The trustee shall keep in the prescribed manner proper books, in which he shall from time to time make or cause to be made entries or minutes of proceedings at meetings and of such other matters as the rules shall direct ; and any creditor of the insolvent may, subject to the control of the court, personally or by his agent inspect such books. (p. 332, *ante*).

Assignee or  
trustee may  
apply for advice  
&c to the court  
or a judge.

*Ib. s. 81.  
See *ib. s. 20*.*

**83.** An assignee or trustee may apply to the court or a judge upon a statement in writing verified by affidavit for the opinion advice or direction of the court or a judge on any question respecting the management of the insolvent estate, and notice of such application shall be served upon or the hearing thereof be attended by all persons interested or such of them as the court or judge shall think expedient ; and the assignee or trustee acting upon the opinion advice or direction of the court or judge shall be deemed to have discharged his duty in the subject matter of the application. Provided that such assignee or trustee shall

not have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion advice or direction ; and the costs of such application shall be in the discretion of the court or judge. (p. 178, *ante*).

SECS. 83-85.

*Insolvency  
Statute 1871.*

84. When any part of the insolvent estate consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable or not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell or has taken possession of such property or exercised any act of ownership in relation thereto, may by writing under his hand disclaim such property, and upon the execution of such disclaimer the property disclaimed shall if the same is a contract be deemed to be determined from the date of the order of sequestration, and if the same is a lease be deemed to have been surrendered on the same date, and if the same be shares in any company be deemed to be forfeited from that date, and if any other species of property it shall revert to the person entitled on the determination of the estate or interest of the insolvent ; but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the insolvent. (p. 210, *ante*).

Disclaimer as  
to onerous  
property.  
*Ib. s. 82.*  
*32 & 33 Vict.*  
*c. 71 s. 23.*

Any person interested in any disclaimed property may apply to the court, and the court may upon such application order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just. (p. 210, *ante*).

Any person injured by the operation of this section shall be deemed a creditor of the insolvent to the extent of such injury, and may accordingly prove the same as a debt under the insolvency. (pp. 210, 306, *ante*).

The trustee shall not be entitled to disclaim any property in pursuance of this Act in cases where an application in writing has been made to him by any person interested in such property, requiring such trustee to decide whether he will disclaim or not, and the trustee has for a period of not less than twenty-eight days after the receipt of such application or such further time as may be allowed by the court declined or neglected to give notice whether he disclaims the same or not. (p. 211, *ante*).

*Ib. s. 24.*

85. Subject to the provisions of this Act, the trustee shall have power to do the following things :—(p. 180, *ante*).

Power of trustee  
to deal with  
property.

**SECS. 80-83.** same as he shall see fit, and also on entering a like suggestion defend any suit or action pending against the insolvent relating to or affecting the insolvent estate. (p. 181, *ante*).

*Insolvency  
Statute 1871.*

Whenever an assignee or trustee shall resign be removed or die or a new assignee or trustee shall be appointed or elected and confirmed no suit or action relative to the insolvent estate shall be thereby abated ; but the court in which any such suit or action is depending or any judge thereof may, upon the suggestion of such resignation death or removal, and that a new assignee or trustee has been appointed or elected and confirmed, allow the name of the new assignee or trustee to be substituted in the place of the former ; and the said suit or action shall proceed as if such new assignee or trustee had originally commenced or defended the same. (pp. 174, 182, 266, *ante*).

The trustee may take advice on any legal question affecting the insolvent estate or the administration thereof, and may employ an attorney or solicitor to commence conduct or defend actions and suits or any other proceedings for or against the insolvent estate, and may charge against such estate all fees allowed upon taxation by the proper officer. (pp. 66, 181, *ante*).

Possession of  
property by  
trustee.

*Ib.* s. 79.  
32 & 33 Vict.  
c. 71 s. 22.

**81.** Where any portion of the property of the insolvent consists of stock shares in ships shares or any other property transferable in the books of any company office or person, the right to transfer such property shall be absolutely vested in the trustee to the same extent as the insolvent might have exercised the same if he had not become insolvent. (pp. 184, 209, *ante*).

Trustee to keep  
books.

*Ib.* s. 80.

**82.** The trustee shall keep in the prescribed manner proper books, in which he shall from time to time make or cause to be made entries or minutes of proceedings at meetings and of such other matters as the rules shall direct ; and any creditor of the insolvent may, subject to the control of the court, personally or by his agent inspect such books. (p. 332, *ante*).

Assignee or  
trustee may  
apply for advice  
&c to the court  
or a judge.

*Ib.* s. 81.

See *ib.* s. 20.

**83.** An assignee or trustee may apply to the court or a judge upon a statement in writing verified by affidavit for the opinion advice or direction of the court or a judge on any question respecting the management of the insolvent estate, and notice of such application shall be served upon or the hearing thereof be attended by all persons interested or such of them as the court or judge shall think expedient ; and the assignee or trustee acting upon the opinion advice or direction of the court or judge shall be deemed to have discharged his duty in the subject matter of the application. Provided that such assignee or trustee shall



not have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion advice or direction ; and the costs of such application shall be in the discretion of the court or judge. (p. 178, *ante*).

SECS. 83-85.

*Insolvency  
Statute 1871.*

84. When any part of the insolvent estate consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable or not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell or has taken possession of such property or exercised any act of ownership in relation thereto, may by writing under his hand disclaim such property, and upon the execution of such disclaimer the property disclaimed shall if the same is a contract be deemed to be determined from the date of the order of sequestration, and if the same is a lease be deemed to have been surrendered on the same date, and if the same be shares in any company be deemed to be forfeited from that date, and if any other species of property it shall revert to the person entitled on the determination of the estate or interest of the insolvent ; but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the insolvent. (p. 210, *ante*).

Disclaimer as  
to onerous  
property.  
*Ib. s. 82.  
32 & 33 Vict.  
c. 71 s. 23.*

Any person interested in any disclaimed property may apply to the court, and the court may upon such application order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just. (p. 210, *ante*).

Any person injured by the operation of this section shall be deemed a creditor of the insolvent to the extent of such injury, and may accordingly prove the same as a debt under the insolvency. (pp. 210, 306, *ante*).

The trustee shall not be entitled to disclaim any property in pursuance of this Act in cases where an application in writing has been made to him by any person interested in such property, requiring such trustee to decide whether he will disclaim or not, and the trustee has for a period of not less than twenty-eight days after the receipt of such application or such further time as may be allowed by the court declined or neglected to give notice whether he disclaims the same or not. (p. 211, *ante*).

*Ib. s. 24.*

85. Subject to the provisions of this Act, the trustee shall have power to do the following things :—(p. 180, *ante*).

Power of trustee  
to deal with  
property.

SECS. 85, 86.

*Insolvency  
Statute 1871  
s. 83.**32 & 33 Vict.  
c. 71 s. 25.*

- (I.) To receive and decide upon proof of debts in the prescribed manner, and for such purpose to administer oaths : (pp. 35, 180, 276, *ante*).
- (II.) To carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same : (p. 180, *ante*).
- (III.) To bring or defend any action suit or other legal proceeding relating to the property of the insolvent : (p. 181, *ante*).
- (IV.) To deal with any property to which the insolvent is beneficially entitled as tenant in tail in the same manner as the insolvent might have dealt with the same ; and Part VIII. of the *Real Property Act* 1890 shall extend and apply to proceedings in insolvency under this Act as if the said Part were here re-enacted and made applicable in terms to such proceedings : (pp. 183, 209, *ante*).
- (v.) To exercise any powers the capacity to exercise which is vested in him under this Act, and to execute all powers of attorney deeds and other instruments expedient or necessary for the purpose of carrying into effect the provisions of this Act : (pp. 183, 240, *ante*).
- (vi.) To sell all the property of the insolvent (including the goodwill of the business, if any, and the book debts due or growing due to the insolvent) by public auction or private contract, with power if he thinks fit to transfer the whole thereof to any person or company, or to sell the same in parcels : (p. 183, *ante*).
- (vii.) To give receipts for any money received by him, which receipt shall effectually discharge the person paying such moneys from all responsibility in respect of the application thereof : (p. 184, *ante*).
- (viii.) To prove rank claim and draw a dividend in the matter of the insolvency or sequestration of any debtor of the insolvent. (pp. 184, 283, *ante*).

Power to allow  
insolvent to  
manage  
property.  
*Ib.* s. 84.  
*Ib.* s. 26.

86. The trustee may appoint the insolvent himself to superintend the management of the property or of any part thereof, or to carry on the trade or business of the insolvent (if any) for the benefit of the creditors, and in any other respect to aid in administering the property in such manner and on such terms as the creditors direct. (pp. 180, 346, *ante*).

**87.** The trustee may with the sanction of a special resolution of a general meeting of creditors or of the committee of inspection do all or any of the following things:—(pp. 185, 197, *ante*). **SECS. 87-89.**

*Insolvency  
Statute 1871  
s. 86.*

Power of trustee  
to compromise  
&c.  
32 & 33 Vict.  
c. 71 s. 27.

- (i.) Mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts: (p. 185, *ante*).
- (ii.) Refer any dispute to arbitration, compromise all debts claims and liabilities whether present or future certain or contingent liquidated or unliquidated subsisting or supposed to subsist between the insolvent and any debtor or person who may have incurred any liability to the insolvent upon the receipt of such sums, payable at such times and generally upon such terms as may be agreed upon: (p. 185, *ante*).
- (iii.) Make such compromise or other arrangement as may be thought expedient with creditors or persons claiming to be creditors in respect of any debts provable under the insolvency: (p. 185, *ante*).
- (iv.) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the insolvent made or capable of being made on the trustee by any person or by the trustee on any person: (p. 185, *ante*).
- (v.) Divide in its existing form amongst the creditors according to its estimated value any property which from its peculiar nature or other special circumstances cannot advantageously be realized by sale. (p. 185, *ante*).

The sanction given for the purposes of this section may be a general permission to do all or any of the above-mentioned things or a permission to do all or any of them in any specified case or cases.

**88.** *Where the trustee is himself a solicitor he may contract to be paid a certain sum by way of percentage or otherwise as a remuneration for his services as trustee, including all professional services, and any such contract shall notwithstanding any law to the contrary be lawful.*

Trustee if a  
solicitor may be  
paid for  
services.

*Ib. s. 80.*

*Ib. s. 29.*

**Repealed.**

*Vide s. 27 (2) Act  
of 1897.*

**89.** The trustee shall pay all sums from time to time received by him into such bank as the majority of the creditors in number and value at any general meeting shall appoint, and failing such appointment into such bank as the rules may from time to time appoint; and if he at any time keep in his hands any sum exceeding fifty pounds for more

Trustee to pay  
moneys into  
bank.

*Ib. s. 87.*

*Ib. s. 30.*

*Vide s. 53 Act  
of 1897.*

**SECS. 89-91.** than ten days he shall be subject to the following liabilities, that is to say :—(p. 335, *ante*).

*Insolvency  
Statute 1871.*

(i.) He shall pay interest at the rate of twenty pounds per centum per annum on the excess of such sum above fifty pounds as he may retain in his hands :

*Vide ss. 53, 54  
and 55 Act of  
1897.*

(ii.) Unless he can prove to the satisfaction of the court that his reason for retaining the money was sufficient, he shall on the application of any creditor be dismissed from his office by the court, and shall have no claim for remuneration, and be liable to any expenses to which the creditors may be put by or in consequence of his dismissal. (pp. 24, 173, 335, *ante*).

In case of a member of a firm becoming insolvent judge may authorize action in name of the trustee and remaining partner.

*Ib. s. 88.*

See 12 & 13 Vict. c. 106 s. 152.

*Vide s. 11 Act of 1897.*

Partner to have notice and be at liberty to show cause.

Judge may direct partner to have part of proceeds.

Assignee or trustee not personally liable for act done in execution of his duty.

*Ib. s. 89.*

**90.** If an insolvent shall at the date of the order of sequestration be a member of a firm, a judge may authorize the trustee upon his application to commence or prosecute any action or other proceeding in the name of such trustee and of the remaining partner against any debtor of the partnership, and such judgment decree or order may be obtained therein as if such action suit or other proceeding had been instituted with the consent of such partner and if such partner shall execute any release of the debt or demand for which such action or suit is instituted such release shall be void provided that every such partner shall have notice given him of such application and be at liberty to show cause against it and if no benefit be claimed by him by virtue of the said proceedings shall be indemnified against the payment of any costs in respect of such action suit or other proceeding in such manner as a judge may direct, and the judge may upon the application of such partner direct that he may receive so much of the proceeds of such action as such court shall direct. (p. 43, *ante*).

**91.** No assignee shall be personally responsible or liable for any act *bond fide* done by him or by his order or authority in the execution of his duty as such assignee by reason of the order *nisi* for sequestration being discharged, and no assignee or trustee shall be deemed personally answerable for or by reason of his having received any money bills notes or other negotiable instruments in his character of assignee or trustee provided he shall have paid or deposited such money bills notes and other negotiable instruments in some bank to his credit as assignee or trustee of the insolvent estate to which they belong and shall have given notice of such payment or deposit (as the case may be) to the person claiming such money bills or other negotiable instruments of the assignee or trustee. And provided also that the assignee or trustee

after such payment or deposit shall not have dealt with such money **SECS. 91-94.**  
 bills notes or other negotiable instruments otherwise than in the execu- Insolvency  
Statute 1871.  
 tion of his duty as assignee or trustee, and if an action shall be brought  
 against any assignee or trustee for any such act done by him or by his  
 order or authority in the execution of his duty either solely or where  
 there shall be two trustees by a trustee jointly with any other trustee  
 in respect of such money bills notes or other negotiable instruments,  
 the court in which the same shall be brought or a judge thereof may  
 upon application of the assignee or trustee and upon an affidavit of  
 facts set aside the proceedings in such action so far as the assignee or  
 trustee is concerned with such costs or without costs as to the court or  
 judge shall seem meet. (pp. 166, 186, *ante*).

**92.** If an insolvent shall at the date of the order of sequestration  
 as trustee be seised possessed of or entitled to, either alone or jointly,  
 any real or personal estate or any interest secured upon or arising out  
 of the same, or shall have standing in his name as trustee either alone  
 or jointly any government stocks funds or securities or any stock of any  
 public or joint stock company, the Supreme Court may on the petition  
 of the person entitled in possession to the receipt of the rents issues  
 and profits dividends interest or produce thereof on due notice given  
 to all persons (if any) interested therein order the trustee and all  
 persons whose act or consent thereto is necessary to convey assign or  
 transfer the said real or personal estate stocks funds or securities or the  
 said stock of any public or joint stock company to such person as the  
 said Supreme Court shall think fit upon the same trusts as the said  
 estate interest stocks funds and securities were subject to before seques-  
 tration or such of them as shall be then subsisting and capable of taking  
 effect and also to receive and pay over the rents issues and profits  
 dividends interest and produce thereof as the said Supreme Court shall  
 direct. (p. 353, *ante*).

Where the  
insolvent is  
trustee the  
Supreme Court  
may order  
conveyance or  
assignment to  
another trustee.  
Ib. s. 99.  
12 & 13 Vict.  
c. 106 s. 130.

**93.** If an insolvent shall have conveyed or assigned any real or  
 personal estate or deposited any deeds such conveyance or assignment  
 assurance or deposit being upon condition or power of redemption at a  
 future day by payment of money or otherwise the trustee may before  
 the time of the performance of such condition make tender or payment  
 of money or other performance according to such condition, and after  
 such tender payment or performance such real or personal estate may  
 be sold and disposed of for the benefit of the creditors. (pp. 201, 208,  
*ante*).

Mortgage may  
be redeemed by  
assignee.  
Ib. s. 91.

**94.** Any mortgagee with the leave of the court first obtained may  
 bid at any sale of the mortgaged property. (p. 208, *ante*).

Mortgagee may  
bid at sale  
subject to orders  
of the court.  
Ib. s. 92.

**SECS. 95-100.**

*Insolvency  
Statute 1871  
s. 93.*

Life estate in  
remainder not to  
be sold except  
by order of the  
court.

**95.** Where under a settlement or will an insolvent shall be entitled to a life estate in remainder expectant upon the death or deaths of any previous tenant or tenants for life with any remainder over to the insolvent's issue or to the heirs of his body or any of them as purchasers the life estate of such insolvent shall not be sold before it falls into possession without an express order of the court. (pp. 184, 209, *ante*).

Court may order  
payment of debts  
due to the insol-  
vent's estate.

*Ib. s. 94.*

**96.** The trustee may by summons call upon any person alleged to be indebted to the insolvent estate to pay the amount of such indebtedness and the court may order that such person shall forthwith or at such time and in such manner by instalments or otherwise as to the court may seem expedient pay the amount if the same does not exceed Two hundred and fifty pounds to the trustee. (pp. 6, 13, *ante*).

Limitation of  
action.

*Ib. s. 95.*

**97.** Every action brought against any person for anything done in pursuance of this Act shall be commenced within six months next after the cause of action has arisen, and if it shall appear that such action was commenced after the time limited as aforesaid for bringing the same the jury shall find for the defendant. (p. 28, *ante*).

Insolvent's  
books not  
subject to lien.

*Ib. s. 96.*

**98.** No person shall be entitled as against the trustee to withhold possession of the books of account or any papers or documents relating to the accounts of the insolvent or to claim any lien thereon. (p. 218, *ante*).

Portion of pay  
half-pay salary  
or pension of  
insolvent to be  
applicable for  
creditors.

*Ib. s. 97.*

See 32 & 33 Vict.  
c. 71 s. 89.

**99.** The court may in its discretion order such portion of the pay half-pay salary emolument or pension of an insolvent to be paid to the trustee to be applied in payment of the debts of such insolvent and such order being lodged in the office of any officer or person appointed to pay or paying any such pay half-pay salary emolument or pension such portion of the said pay half-pay salary emolument or pension as shall be specified in such order shall be paid to such trustee until the court shall otherwise order. (p. 259, *ante*).

Trustee of  
deceased person  
may apply for  
order to vest  
real estate.

*Ib. s. 98.*

**100.** The trustee of an estate sequestrated by the executor or administrator of any person deceased may after the whole of the personal estate has been administered if the same be not sufficient to pay the debts proved and provable against such estate apply to the court upon notice to the persons to whom the real estate of the said deceased may have descended or been devised for an order vesting such real estate in the trustee for the purpose of distribution amongst the creditors of the deceased and the court may make such order and thereupon such real estate shall vest in the trustee for the whole estate of the persons served and the same shall be realized and distributed in the same manner as the real estate of any insolvent. (p. 331, *ante*).

**101.** If any debt or sum of money due to any insolvent be charged upon any land by way of equitable mortgage the trustee may apply to the court upon notice to all parties interested for an order for the sale of the lands comprised in such equitable mortgage and the court may make such order. (pp. 183, 208, *ante*).

SECS. 101-5.

*Insolvency  
Statute 1871  
s. 99.*Court may  
order sale of  
property under  
equitable  
charge.

**102.** The estate real or personal of any person deceased whose estate is sequestrated by his or her representative shall be distributed and administered upon the same principles and in the same way as the estate of any living person. (pp. 78, 330, *ante*).

Mode of  
distribution of  
deceased  
person's estate.*Ib. s. 100.*Affected by s.  
113 (3, 4) Act of  
1897.

**103.** Where an insolvent has property real or personal elsewhere than in Victoria or any interest therein whether in possession reversion or expectancy the court may upon the application of the trustee order such insolvent to execute all necessary deeds instruments and writings and to do all such acts matters and things as may be necessary to enable the trustee to realise or make available the whole or such part thereof or the proceeds thereof as the court may think proper for distribution amongst the creditors of the said insolvent. (p. 207, *ante*).

Court may  
require  
conveyance by  
insolvent of his  
property out of  
Victoria.*Ib. s. 101.*

**104.** If upon the application of the assignee or trustee it shall be proved to the satisfaction of a judge that there is reason to believe that the insolvent has been guilty of fraud or concealment of property or has absconded such judge may order that for a period of three months from the date of the order of sequestration all post letters directed or addressed to an insolvent shall be re-directed re-addressed sent or delivered by the Postmaster-General or the officers acting under him to the judge by whom such order is made, and upon notice by transmission of an office copy of any such order to the Postmaster-General or the officers acting under him of the making of such order the Postmaster-General or such officers as aforesaid in Victoria may re-address re-direct send or deliver all such post letters to the said judge who may deal with the same as he may think proper, and a judge may upon any application to be made for that purpose renew any such order for a like or for any other less period as often as may be necessary. (p. 219, *ante*).

Post letters  
may be  
re-addressed  
and sent to a  
judge.*Ib. s. 102.*

**105.** If the produce of an insolvent estate shall be sufficient to pay twenty shillings in the pound as hereinafter mentioned and leave a surplus the court may upon the application of the insolvent after three days' notice in writing to the trustee, order the remainder of the insolvent estate to be conveyed assigned and delivered to such insolvent his executors administrators or assigns, and every such insolvent shall be entitled to recover the remainder (if any) of the debts due to him.

If produce of  
estate pay  
twenty shillings  
in the pound and  
leave surplus  
such surplus to  
be paid to  
insolvent.*Ib. s. 103.***Repealed.**Vide s. 49 Act  
of 1897.

## SECS. 106-11.

## DIVISION 3.—PROOF OF DEBTS.

*Insolvency  
Statute 1871  
s. 104.*

When and how  
debts may be  
proved.

**106.** All debts provable in insolvency may be proved and every creditor of the insolvent or any one or more of several joint creditors may after sequestration prove his or their debt by delivering or sending through the general post to the assignee or trustee as the case may be an affidavit or declaration by the creditor containing a full true and complete statement of account between the creditor and the insolvent and that the debt thereby appearing to be due from the estate of the insolvent to the creditor is justly due and all bodies politic and incorporated companies may prove by an agent provided such agent shall in his affidavit or declaration state that he is such agent and that he is authorized to make such proof and such affidavit or declaration shall be in such form as may be directed by the rules. (p. 272, 281, *ante*).

Votes at  
meetings.

*Ib. s. 105.*

**107.** No person shall vote at any meeting if notice of an application to expunge or reduce his proof has been given; and if before or at any meeting of creditors any creditor or the assignee trustee or insolvent shall give notice of motion to expunge or reduce a proof of debt sought to be used at such meeting, it shall if the majority in number of the creditors present or represented at such meeting so desire be adjourned until such motion has been disposed of or until such time as they may direct. (p. 160, *ante*).

Trustee to ex-  
amine all proofs  
and to make out  
list of creditors  
who have  
proved.

*Ib. s. 106.*

**108.** The trustee shall examine all the affidavits and declarations of proof aforesaid and compare the same with the books accounts and other documents of the insolvent, and shall from time to time make out a list of the creditors who have proved stating the amount and nature of such debts, which list shall be open to the inspection of any creditor who has proved, and all proofs of debt delivered or sent to a trustee shall be filed by him in the office of the court. (p. 274, 276, *ante*).

Proof may be  
expunged or  
reduced.

*Ib. s. 107.*

**109.** The court may at any time admit reject expunge or reduce a proof of debt on the application of any creditor or of the trustee or of the insolvent. (p. 276, *ante*).

Landlord to be  
entitled to three  
months' rent &c.

*Ib. s. 108.*

See 32 & 33 Vict.  
c. 71 s. 34.

S. 117, Act of  
1897, is substi-  
tuted for this  
section.

As to securing to  
claimants debts  
which may  
eventually be  
established.

**110.** *No distress for rent shall be made levied or proceeded in after sequestration; but the landlord shall be entitled to receive out of the insolvent estate so much rent as shall be then due, not exceeding three months' rent, and shall be allowed to come in as a creditor and share rateably with the other creditors for the balance.*

**111.** When by reason of the absence of any person from Victoria or for any other cause the court shall be of opinion that a claimant who has not proved his debt may eventually be able to establish the same,



the court may allow such claim to be entered in the proceedings in the insolvent estate and may give reasonable time for proving the same, and in the meantime may make such order for securing the amount thereof in case the said claim shall be afterwards established as the court shall think fit. (pp. 272, 322, *ante*).

*Insolvency  
Statute 1871  
s. 100.*

See 32 & 33 Vict.  
c. 71 s. 42.

*Vide s. 45 Act  
of 1897.*

**112.** Any debt provable in insolvency may be proved at any time before the final distribution of the estate; but when any debt is so proved after any dividend has been paid to the creditors, such dividend shall not in any way be disturbed or affected by or in respect of any such debt; but such creditor shall receive payment of his debt out of the future assets of the estate in the same proportion as the other creditors shall have already received and shall afterwards receive payment. (pp. 272, 322, *ante*).

Within what  
time debts are  
provable and  
effect thereof on  
dividend previously  
made.

*Ib. s. 110.*

See *ib. s. 43.*

Affected by  
*s. 46 Act of 1897.*

**113.** A person entitled to enforce against an insolvent payment of any money costs or expenses by process of contempt issuing out of any court shall be entitled to come in as a creditor under the sequestration and prove the amount payable under the process subject to such ascertaining of the amount as may be properly had by taxation or otherwise. (p. 289, *ante*).

Proof for money  
costs &c. of  
which payment  
may be enforced  
by process of  
contempt.

*Ib. s. 111.*

24 & 25 Vict.  
c. 134 s. 149.

**114.** Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in insolvency. (pp. 279, 303, *ante*).

Description of  
debts provable  
in insolvency.

*Ib. s. 112.*

See 32 & 33 Vict.  
c. 71 s. 31.

Save as aforesaid all debts and liabilities present or future certain or contingent to which the insolvent is subject at the date of the order of sequestration, or to which he may become subject before he obtains his certificate by reason of any obligation incurred previously to the date of the order of sequestration, shall be deemed to be debts provable in insolvency, and may be proved in manner aforesaid. (pp. 279, 303, *ante*).

An estimate shall be made according to the rules of the court for the time being in force, so far as the same may be applicable, and where they are not applicable at the discretion of the trustee, of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies or for any other reason does not bear a certain value. (p. 303, *ante*).

Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the court, and the court may if it think the value of the debt or liability incapable of being fairly estimated make an order to that effect, and upon such order being made such debt or liability shall for the purposes of this Act be deemed to be a debt not

**SECS. 114-16.** provable in insolvency; but if the court think that the value of the debt or liability is capable of being fairly estimated it may direct such value to be assessed with the consent of all the parties interested before the court itself without the intervention of a jury, or if such parties do not consent by jury either before the court itself or some other competent court, and may give all necessary directions for such purpose, and the amount of such value when assessed shall be provable as a debt under the insolvency. (pp. 304, 400, *ante*).

*Insolvency  
Statute 1871.*

“Liability” shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money’s worth on the breach of any express or implied covenant contract agreement or undertaking, whether such breach does or does not occur, or is or is not likely to occur or capable of occurring before the grant of a certificate to the insolvent, and generally it shall include any express or implied engagement agreement or undertaking to pay or capable of resulting in the payment of money or money’s worth, whether such payment be as respects amount fixed or unliquidated; as respects time present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or assessable only by a jury or as matter of opinion. (p. 280, *ante*).

Preferential  
debts.  
*Ib.* s. 113.  
32 & 33 Vict.  
c. 71 s. 32.

**115.** The debts hereinafter mentioned shall be paid in priority to all other debts. Between themselves such debts shall rank equally and shall be paid in full, unless the property of the insolvent is insufficient to meet them, in which case they shall abate in equal proportions between themselves (that is to say) :—

Affected by s.  
113 (3) Act of  
1897.

(I.) All local rates due from him at the date of the order of sequestration and having become due and payable within twelve months next before such time. (pp. 286, 317, *ante*).

(II.) All wages or salary of any clerk or servant in the employment of the insolvent at the date of the order of sequestration not exceeding four months’ wages or salary and not exceeding Fifty pounds; all wages of any laborer or workman in the employment of the insolvent at the date of the order of sequestration, and not exceeding four months’ wages. (pp. 286, 317, *ante*).

Save as aforesaid all debts provable under the insolvency shall be paid *pari passu*. (p. 280, *ante*).

Preferential  
claim in case of  
apprenticeship.

**116.** Where at the time of the order of sequestration any person is apprenticed or is an articulated clerk to the insolvent, the order of seques-

tration shall, if either the insolvent or apprentice or clerk give notice in writing to the trustee to that effect, be a complete discharge of the indenture of apprenticeship or articles of agreement; and if any money has been paid by or on behalf of such apprentice or clerk to the insolvent as a fee the trustee may, on the application of the apprentice or clerk or of some person on his behalf, pay such sum as such trustee, subject to an appeal to the court, thinks reasonable, out of the insolvent's estate to or for the use of the apprentice or clerk, regard being had to the amount paid by him or on his behalf and to the time during which he served with the insolvent under the indenture or articles before the commencement of the insolvency, and to the other circumstances of the case. (p.p. 288, 317, *ante*).

SECS. 116-20.  
*Insolvency  
 Statute 1871.  
 s. 114.  
 32 & 33 Vict. c.  
 71 s. 33.*

Where it appears expedient to a trustee he may on the application of any apprentice or articulated clerk to the insolvent, or any person acting on behalf of such apprentice or articulated clerk, instead of acting under the preceding provisions of this section transfer the indenture of apprenticeship or articles of agreement to some other person. (p. 288, *ante*).

117. When any rent or other payment falls due at stated periods, and the order of sequestration is made at any time other than one of such periods, the person entitled to such rent or payment may prove for a proportionate part thereof up to the day of the date of the order of sequestration as if such rent or payment grew due from day to day. (pp. 211, 284, *ante*).

*Proof in case of  
 rent and periodi-  
 cal payment.  
 Ib. s. 115.  
 Ib. s. 35.*

118. Interest on any debt provable in insolvency may be allowed by the court or trustee under the same circumstances in which interest would have been allowable by a jury if an action had been brought for such debt.

*Interest on  
 debts.  
 Ib. s. 116.  
 Ib. s. 36.*

119. If an insolvent is at the date of the order of sequestration liable in respect of distinct contracts as member of two or more distinct firms, or as a sole contractor and also as member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of such contracts against the properties respectively liable upon such contractors. (p. 300, *ante*).

*Proof in respect  
 of distinct  
 contracts.  
 Ib. s. 117.  
 Ib. s. 37.*

120. The trustee may from time to time make such allowance as may be approved by the court the committee of inspection or resolution passed by a general meeting of creditors to the insolvent out of his property for the support of the insolvent and his family, or in considera-

*Allowance to  
 insolvent for  
 maintenance or  
 service.  
 Ib. s. 118.  
 Ib. s. 38.*

**SECS. 120-23.** tion of his services if he is engaged in winding up his estate. (pp. 55, 181, 197, 345, *ante*).

*Insolvency  
Statute 1871.*

*Set-off.*

*Ib. s. 119.*

*See 32 & 33 Vict.  
c. 71 s. 39.*

**121.** Where there have been mutual credits mutual debts or other mutual dealings between the insolvent and any other person proving or claiming to prove a debt under the sequestration, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account and no more shall be claimed or paid on either side respectively. (p. 312, *ante*).

*Provision as to  
secured creditor.*

*Ib. s. 120.*

*Ib. s. 40.*

**122.** A creditor holding a specific security on the property of the insolvent or any part thereof may, on giving up his security, prove for his whole debt. (pp. 291, 308, 311, *ante*).

He shall also be entitled to a dividend in respect of the balance due to him after realizing or giving credit for the value of his security, in manner and at the time prescribed. (p. 311, *ante*).

A creditor holding such security as aforesaid and not complying with the foregoing conditions shall be excluded from all share in any dividend. (p. 311, *ante*).

#### DIVISION 4.—DISTRIBUTION OF ESTATE.

*Order of  
distribution of  
estate.*

*Ib. s. 121.*

**123.** The trustee of an insolvent estate shall subject to the provisions of this Act pay and apply the proceeds arising from the collection getting in and sale or mortgage of the insolvent estate in manner following (that is to say) :—(p. 316, *ante*).

- (i.) In payment of all taxed costs charges allowances and expenses properly incurred by or payable by him in the execution of his office of trustee. (pp. 54, 269, 316, *ante*).
- (ii.) In payment of the remuneration or commission allowed by this Act. (pp. 315, 316, *ante*).
- (iii.) In payment of all preferential debts and sums of money directed or authorized by this Act to be paid to creditors or others in priority to the general creditors and if the estate be insufficient to meet such preferential debts and sums of money they shall abate in equal proportions between themselves. (p. 316, *ante*).
- (iv.) In payment to and amongst all other creditors who have proved their debts rateably in proportion to the amounts of their respective proofs. (pp. 316, 317, *ante*).

Provided that the trustee shall not declare any dividend until after the expiration of the prescribed time or such time as the court or a judge may order. SECS. 123-27.  
*Insolvency  
Statute 1871.*

**124.** The trustee shall at such periods as may be fixed by the rules file in the office of the court statements showing how the insolvent estate has been applied and disposed of under the following heads (that is to say) :— Trustees to file  
statement.  
*Ib. s. 122.*

(I.) Costs charges allowances and expenses.

(II.) Remuneration or commission.

(III.) Preferential payments to creditors or others directed or authorized to be made by this Act.

(IV.) Dividends to general creditors.

And if any part of the insolvent estate be not at the time of filing any such statement collected got in sold or disposed of such statement shall also specify shortly the nature of such unrealized estate. (p. 338, *ante*).

The trustee shall make out and file such further or fuller statements or accounts as the court or a judge may order. Further  
accounts.

**125.** The court may upon the complaint of any creditor or person pecuniarily interested inquire into and allow or disallow as may be just all or any part of the costs charges expenses and payments charged claimed or made by the assignee or trustee and make such order thereon as the court may think fit. (pp. 24, 66, *ante*). Court may  
disallow costs  
charges &c.  
*Ib. s. 123.*

**126.** The trustee shall cause notice to be given in the *Government Gazette* when and where dividends or moneys are payable to creditors and others interested in the insolvent estate, and the remedy to obtain payment shall be by application to the court and the order of the court thereon. (p. 318, *ante*). Trustee to give  
notice of  
dividend.  
*Ib. s. 124.*  
See 12 & 13 Vict.  
c. 106 s. 190.  
See 32 & 33 Vict.  
c. 71 s. 46.

**127.** All dividends in insolvent estates now in the hands of any of the present official assignees of insolvent estates and which have not been claimed by the parties entitled thereto for the space of six months next after the same shall be payable shall unless the court shall otherwise order be paid into Her Majesty's Treasury to the credit of a fund to be called the "Insolvency Unclaimed Dividend Fund;" and all dividends in insolvent estates administered under the provisions of this Act unless the court shall otherwise order which shall be unclaimed by the parties entitled thereto for the space of six months next after the same shall be payable shall be paid into Her Majesty's Treasury to the credit of the said fund. (pp. 193, 324, *ante*). Unclaimed  
dividends to be  
paid into  
unclaimed  
dividend fund.  
*Ib. s. 125.*  
See 12 & 13 Vict.  
c. 106 s. 191.  
As to unclaimed  
dividends in  
estates under  
this Act.  
Affected by s. 60  
Act of 1897.

## SECS. 127-28.

*Insolvency  
Statute 1871.  
"Insolvency  
Suits' Fund."*

The Governor in Council may direct that all sums paid to the credit of the said fund shall be invested in debentures of the Government of Victoria, and the interest arising from such investment shall be paid to the credit of a fund to be called the "Insolvency Suits' Fund." (pp. 325, *ante*).

Unclaimed  
dividends may  
under circum-  
stances be paid  
to persons  
entitled.

Any person entitled to receive any dividends hereby directed to be paid into the said "Insolvency Unclaimed Dividend Fund" may apply to the court for payment of such dividends to him, and the court may order such dividends to be paid to him; and upon every such order the Governor shall issue his warrant for the payment of the amount specified in such order, and the Treasurer of Victoria shall pay the same out of the said fund.

Attorney-  
General may  
order certain  
expenses to be  
paid out of  
"Insolvency  
Suits' Fund."

If it shall appear to the Attorney-General upon the application of the assignee or trustee that inquiries or proceedings relating to an insolvent estate ought to be instituted or carried on or any prosecution ought to be carried on against any person for any offence under this Act and that there are no funds in the particular estate available for such inquiries proceedings or prosecution, the Attorney-General may direct the payment of the costs of any such inquiries proceedings or prosecution after taxation thereof out of the said "Insolvency Suits' Fund;" and upon every such order the Governor shall issue his warrant for the payment of the amount of such taxed costs and the Treasurer of Victoria shall pay the same out of the said fund. (p. 59, *ante*).

## PART VI.—INSOLVENT.

Conduct of  
insolvent.

*Ib. s. 120.*

See 32 & 33 Vict.  
c. 71 s. 19.

**128.** Every insolvent before he obtains his certificate shall from time to time as the rules shall direct inform the assignee or trustee of any change in his residence and of his mode and means of livelihood, and the insolvent shall, to the utmost of his power, aid in the realization of his property and the distribution of the proceeds amongst his creditors. He shall produce such a statement of his affairs and shall give such inventory of his property, such list of his creditors and debtors and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend such meetings of his creditors, wait at such times on the trustee, execute such powers of attorney conveyances deeds and instruments, and generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors as may be reasonably required by the trustee, or may be prescribed by rules of court, or be directed by the court by any special order or orders made in reference to any particular

insolvency, or made on the occasion of any special application by the trustee or any creditor. If the insolvent wilfully fail to perform the duties imposed on him by this section or any of them, or if he fail to deliver up possession to the trustee of any part of his property which is divisible amongst his creditors under this Act, and which may for the time being be in the possession or under the control of such insolvent, he shall in addition to any other punishment to which he may be subject be guilty of a contempt of court and may be punished accordingly. (pp. 25, 26, 340, 341, 342, 365, 366, 367, *ante*).

SECS. 128-30.  
*Insolvency  
Statute 1871.*

129. The court may, by warrant addressed to any constable or prescribed officer of the court, cause an insolvent to be arrested, and any books papers moneys goods and chattels in his possession to be seized, and him and them to be safely kept as prescribed until such time as the court may order under the following circumstances :—

Arrest of  
insolvent under  
certain circum-  
stances.  
*Ib. s. 127.*  
See 32 & 33 Vict  
c. 71 s. 80.

- (I.) If, after sequestration or the commencement of the liquidation, it appear to the court that there is probable reason for believing that the insolvent is about to go abroad or to quit his place of residence, with a view of avoiding examination in respect of his affairs, or otherwise delaying or embarrassing the proceedings in insolvency : (p.p. 348, 357, *ante*).
- (II.) If, after sequestration or the commencement of the liquidation, it appear to the court that there is probable cause for believing that the insolvent is about to remove his goods or chattels with a view of preventing or delaying such goods or chattels being taken possession of by the trustee, or that there is probable ground for believing that he has concealed or is about to conceal or destroy any of his goods or chattels, or any books documents or writings which might be of use to his creditors in the course of his insolvency. (p. 349, *ante*).
- (III.) If, after the service of a debtor summons or after sequestration or the commencement of the liquidation, the debtor or insolvent remove any goods or chattels in his possession above the value of Five pounds, without the leave of the trustee, or if, without good cause shown, he fails to attend any examination ordered by the court. (p.p. 25, 61, 349, 357, *ante*).

130. If an insolvent shall die after sequestration under Part III. or adjudication of sequestration the sequestration shall after notice has

Court may proceed notwithstanding death of insolvent.

**SECS. 130-34.** been given to such persons (if any) as the court may think fit be proceeded in as if such insolvent were living. (pp. 73, 152, 353, *ante*).

*Insolvency Statute 1871 s. 128.*

See 12 & 13 Vict. c. 106 s. 116.

See 32 & 33 Vict. c. 71 s. 80 (9).

Offer of composition and order of release thereon.

*Id.* s. 129.

See *ib.* s. 28

Amended by s. 14 Act of 1897.

**131.** If at any time after sequestration three-fourths in number and value of the creditors who have proved debts by writing under their hands agree to accept an offer of composition or security for composition by the insolvent or any person on his behalf, the insolvent may apply to the court for an order releasing his estate from sequestration and the court may upon being satisfied that such offer has been actually accepted in manner aforesaid and that the terms of such offer have been complied with by the insolvent and that acceptance of the same has not been procured by him or any one on his behalf to his knowledge or belief by any fraudulent or undue means or influence or to the advantage of one creditor over another unless with the knowledge and consent in writing of the rest of the creditors, make such order upon such terms as to costs commission or remuneration and charges already incurred as may be just. (pp. 14, 82, 162, 194, 403 to 409, *ante*).

If insolvent pay in full or obtain release.

*Id.* s. 130.

**132.** If an insolvent or any person on his behalf pay in full all his creditors or obtain a legal release of the debts due by the insolvent to such creditors, the insolvent may apply to the court for an order releasing his estate from sequestration; and the court may upon being satisfied that all the creditors of such insolvent have been paid in full or released their debts as aforesaid make such order upon such terms as to costs commission or remuneration and charges already incurred as may be just. (pp. 194, 409, *ante*).

Order of court shall have effect of revesting his estate in insolvent when released from sequestration.

*Id.* s. 131.

**133.** Any order of the court whereby the estate of any insolvent shall be ordered to be released from sequestration shall have the effect of revesting in the insolvent all the property of the insolvent undisposed of which by virtue of this Act shall be vested in any assignee or trustee of any insolvent estate in the same manner as if the estate of such insolvent had never been sequestrated. (pp. 345, 409, *ante*).

#### PART VII.—EXAMINATION OF INSOLVENT AND WITNESSES.

Examination sitting.

*Id.* s. 132.

Affected by Part X. Act of 1897.

**134.** The judge may within three months after sequestration under Part III. or adjudication of sequestration upon the application in writing of the trustee cause an examination sitting of the court to be holden at which the insolvent shall attend (having no lawful impediment at such time made known to and allowed by the court) and submit to be examined on oath by the trustee or any creditor as to his trade dealings and estate, and upon any matter which may tend to disclose any secret alienation transfer surrender delivery or concealment



of his estate or effects, and the court may adjourn such sitting from time to time as it may think fit; and the trustee shall give notice of the time and place at which such sitting is to be held by advertisement in the *Government Gazette*, and one newspaper published in the district, and shall give notice to the insolvent in the prescribed mode. (pp. 199, 355, 361, *ante*).

SECS. 134-35.  
*Insolvency  
Statute 1871.*

135. The court may on the application of the trustee, at any time after a sequestration or the commencement of the liquidation summon before it the insolvent or his wife or any other person known or suspected to have in his possession any of the estate or effects belonging to the insolvent or supposed to be indebted to the insolvent, or any person whom the court may deem capable of giving information respecting the insolvent his trade dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the insolvent his dealings or property; and if any person so summoned after having been tendered a reasonable sum refuses to come before the court at the time appointed, or refuses to produce such documents having no lawful impediment made known to the court at the time of its sitting and allowed by it, the court may by warrant addressed as aforesaid cause such person to be apprehended and brought up for examination. (pp. 39, 357 to 359, 362, 365, 369, *ante*).

Power of court  
to summon  
persons before it  
suspected of  
having property  
of insolvent.  
*Id. s. 133.  
32 & 33 Vict.  
c. 71 s. 96.*

Affected by  
Part X. Act of  
1897.

The court may examine upon oath, either by word of mouth or by written interrogatories, any person so brought before it in manner aforesaid concerning the insolvent his dealings or property. (p. 362, *ante*).

*Id. s. 97.*

If an insolvent shall at the examination sitting or any adjournment thereof or if the insolvent his wife or any other person shall at any examination upon any summons under this section or any adjournment thereof being thereunto required refuse to lodge a true inventory of his estate and effects or to surrender the books papers writings documents bills or vouchers relating to his estate as aforesaid or shall at such sitting or upon such summons refuse to be sworn, or shall refuse to answer any lawful question touching any of the matters aforesaid, or shall refuse to sign or subscribe his examination (not having any lawful objection allowed by the court), the court may commit him to such prison as it shall think fit, there to remain without bail until he submit to do the matters aforesaid or to be sworn or make answer or sign and subscribe such examination as aforesaid. (pp. 25, 362, 367, *ante*).

In what cases the  
insolvent and  
others under  
examination  
may be  
committed.

If an insolvent or any other person shall while under examination before the court be guilty of prevarication or evasion, the court may

Commitment of  
insolvent or  
witness.

**SECS. 135-38.** commit such insolvent or other person to prison for any term not exceeding one month.

*Insolvency  
Statute 1871.*  
Adjournment of  
summons.

Any summons for the examination of an insolvent or other person under this section may be adjourned from time to time as often as it may seem fit to the court, and the court shall have and may exercise at any adjournment of any such summons all the powers hereby given.

Expenses to be  
tendered to per-  
sons summoned.

The insolvent and every other person summoned before the court to be examined or give evidence or make disclosure of the trade dealing estate or effects of any insolvent under this section shall be entitled to the same conduct money and expenses as a witness in any civil suit. (p. 61, *ante*).

Evidence under  
this Part may  
be reduced to  
writing.

*Act No. 411 s. 7.*

**136.** On any examination under this Part of this Act the court may permit or direct the chief clerk or such other person as the court may approve to reduce the evidence of the insolvent or person examined to writing. (pp. 199, 359, *ante*).

As to discharge  
from prison by  
court or judge  
of person under  
commitment.

*Insolvency  
Statute 1871  
s. 134.*

**137.** If any person be committed by the court for refusing to answer any question, every such question shall be set out in the warrant; and any person committed under this Part of this Act for refusing to answer or for prevarication or evasion may make application to the Supreme Court or a judge thereof in order to be discharged from such commitment, and if there shall not appear to the said court or judge any insufficiency or informality in the form of the warrant, such court or judge may and is hereby required to re-commit such person to the same prison, there to remain until he shall conform as aforesaid, unless it appear to such court or judge that the person committed has fully answered all lawful questions put to him on his examination aforesaid, or (if such person was committed for refusing to be sworn or for not signing his examination) unless it shall appear to such court or judge that he had a sufficient reason for the same. Provided that such court or judge may consider the whole examination of such party whereof any such question was a part, and if it shall appear from the whole examination that the answer or answers of the party committed is or are satisfactory such court or judge shall and may order the party so committed to be discharged. (pp. 367, 368, *ante*).

Questions put to  
insolvent.

No question put to any insolvent on any examination under this Act shall be deemed unlawful by reason only that the answer thereto may expose him to punishment under this Act. (pp. 199, 361, *ante*).

#### PART VIII\*.—CERTIFICATE.

Certificate how  
and when  
applied for.

**138.** After the expiration of three months from the date of the

\*Part VIII. of this Act is affected by Part VII., Act of 1897.

order of sequestration an insolvent may cause an advertisement to be inserted in the *Government Gazette* stating his intention on a day named therein and not less than twenty nor more than thirty days from the day of the publication of such advertisement to apply to the court for a certificate of discharge under this Act, and every insolvent shall also give twenty days' notice in writing to the assignee or trustee of his estate of such his intended application and of the time when the same is to be made; and such application shall be heard on such day and on any day or days of adjournment therefrom, and the trustee or any creditor may be heard in opposition to such application upon giving notice of such opposition and the grounds thereof in such manner and at such time as may be prescribed or be directed by order in any particular case.

*Insolvency  
Statute 1871  
s. 135.*

The court shall, before granting any such application whether the trustee or any creditor oppose or not consider the depositions (if any) of the insolvent, and any evidence produced by him, and if there be opposition then the said depositions (if any) and any other evidence produced by the assignee trustee creditor or insolvent (as the case may be), and shall make order thereon in accordance with the provisions of this Part of this Act. (pp. 364, 373, 374, *ante*).

*Proceedings on  
such application.*

139. Such certificate shall not be granted unless it is proved to the court that a dividend of not less than Seven shillings in the pound has been or will be paid out of the insolvent estate or might have been or might be paid except through the negligence or fraud of the assignee or trustee, but the court may dispense with this condition or modify the same by reducing the required dividend if the insolvent shall prove to its satisfaction that the failure to pay Seven shillings in the pound has arisen from circumstances for which the insolvent cannot in the opinion of the judge justly be held responsible. (pp. 11, 22, 194, 377, *ante*).

*Conditions as to  
certificate.  
Ib. s. 136.  
See 32 & 33 Vict.  
c. 71 s. 48.*

140. If the insolvent has been convicted of any felony or misdemeanor under this Act his certificate shall be refused, or if the insolvent has not been tried but the court is of opinion that the insolvent has been guilty of a felony or misdemeanor under this Act the certificate shall be refused, and the court may in addition sentence such insolvent to imprisonment with or without hard labour for any period not exceeding one year. (pp. 25, 26, 387, *ante*).

*Refusal of  
certificate of  
insolvent guilty  
of misdemeanor.  
Ib. s. 137.*

141. If the insolvent has been guilty of any of the offences following (that is to say):—(pp. 387, 388 to 397, *ante*).

*Court may  
suspend  
certificate and  
imprison in  
certain cases.  
Ib. s. 133.*

- (1.) If the insolvent has not kept reasonable accounts or entries of his receipts and payments :

## SEC. 141.

*Insolvency  
Statute 1871.*

- (II.) If there shall be an unsatisfied judgment against the insolvent in any action for assault breach of promise or seduction or for any malicious injury or for damages in any divorce suit :
- (III.) If the insolvent shall have put any creditor to any vexatious or unjustifiable expense by any frivolous or inequitable defence or claim in any action suit or other proceeding :
- (IV.) If the insolvent shall have wilfully delayed sequestrating his estate or avoided the sequestration thereof in order to benefit or assist one or more creditors to the disadvantage and loss of the rest :
- (V.) If the insolvent shall have by habits of gambling extravagance or vice diminished his means of payment so as to lead to his becoming insolvent :
- (VI.) If the insolvent has not complied with the lawful directions and demands of the assignee or trustee of his estate :
- (VII.) If the insolvent being a trader has carried on trade by means of fictitious capital :
- (VIII.) If the insolvent has not so far as he was examined thereupon made a full and fair disclosure of his property in possession reversion or expectancy :
- (IX.) If the insolvent shall have wilfully violated or omitted to comply with any of the provisions of this Act :
- (X.) If the insolvent shall have contracted any debt or debts to any of his creditors without in fact intending to pay or having at the time he contracted such debt or debts any reasonable or probable expectation of being able to pay the same :
- (XI.) If the insolvent being at the time indebted to any of his creditors shall have unjustifiably made away with or disposed of otherwise than *bond fide* and for a valuable consideration any of his property :
- (XII.) If he shall have unlawfully expended for his own benefit or appropriated to his own use any property of which he shall at the time have had the charge or disposition as a trustee or agent factor or broker only and not in any other capacity :
- (XIII.) If the insolvent shall have given any creditor a fraudulent preference :

The court shall refuse or suspend the certificate for such period not

exceeding two years as it may deem just, and may also if it see fit sentence the insolvent to imprisonment for any period not exceeding six months. (pp. 25, 388 to 397, *ante*).

*SECS. 142-46.*  
*Insolvency*  
*Statute 1871.*

**142.** If it shall appear to the court upon an application for a certificate that though the insolvent has not been guilty of any of the offences mentioned in the two last preceding sections his conduct before or after sequestration has been fraudulent or culpably negligent the court may suspend the certificate for any period not exceeding one year. (pp. 25, 398, *ante*).

Court may have regard to conduct other than the matters already specified.  
*Ib. s. 139.*

**143.** In any case if the court shall be of opinion that a certificate ought not to be granted unconditionally it may grant a certificate subject to any condition touching any salary pension emoluments profits wages earnings or income which may afterwards become due to or be earned by the insolvent and generally touching after acquired property. (p. 385, *ante*).

Conditional certificate.  
*Ib. s. 140.*

**144.** No application for a certificate shall be entertained by the court after the expiration of twelve months from the date of the order of sequestration unless notice of intention to apply had been duly advertised before the expiration of the said period except by leave of the court upon such terms (if any) as the court may think fit. (p. 378, *ante*).

No application to be allowed after twelve months.  
*Ib. s. 141.*

**145.** The certificate shall be in the prescribed form and shall be under the hand of the judge and the seal of the court, but shall not be drawn up or take effect until after the expiration of the time allowed for appeal, or if an appeal be brought after the decision of the court of appeal upon such appeal, and shall bear date either the day after the expiration of the time allowed for appeal or the day of the decision of the court of appeal, as the case may require. Such certificate shall upon taking effect discharge the insolvent from all debts provable under his insolvency save as herein otherwise provided ; and if thereafter any action shall be brought against him for any such debt claim or demand he may plead in general that the cause of action accrued before he became insolvent and may give this Act and the special matter in evidence, and the certificate shall be sufficient evidence of the sequestration and the proceedings precedent thereto. (p. 399, *ante*).

Form of certificate.  
Certificate when to be drawn up.  
*Ib. s. 142.*

Effect of certificate.  
See 32 & 33 Vict. c. 71 s. 49.

**146.** The certificate shall not release or discharge any person who was a partner with the insolvent at the time of the insolvency or was then jointly bound or had made any joint contract with him. (p. 399, *ante*).

Effect of certificate in case of partners &c.  
*Ib. s. 143.*  
See *ib. s. 50.*

**SECS. 147-50.**

*Insolvency  
Statute 1871  
s. 144.  
Contract or  
security &c.  
with intent to  
induce creditor  
to forbear  
opposition void.  
5 Geo. II. c. 30  
s. 11.*

**147.** Any contract covenant or security made or given by an insolvent or other person with to or in trust for any creditor for securing the payment of any money as a consideration or with intent to persuade the creditor to forbear opposing the certificate or to appeal against the grant of the same shall be void, and any money thereby secured or agreed to be paid shall not be recoverable ; and the party sued on any such contract or security may plead in general that the cause of action accrued after sequestration and may give this Act and the special matter in evidence : but no such security if negotiable shall be void as against a *bona fide* holder thereof for value without notice of the consideration for which it was given.

If a creditor of an insolvent shall obtain any sum of money or any goods chattels or security for money from any person as an inducement for forbearing to oppose or for consenting to the allowance of the certificate of such insolvent, or to forbear to appeal against the grant of the same every such creditor so offending shall forfeit and lose for every such offence the treble value or amount of such money goods chattels or security so obtained which may be recovered by any person upon information before and by order of the court in the prescribed manner. (pp. 26, 382, *ante*).

*Court may hold  
insolvent to bail  
to come up for  
judgment.  
Ib. s. 145.*

**148.** If upon an application for a certificate the same is opposed the court may require the insolvent to find bail with two sufficient sureties to attend upon the day appointed for giving judgment on such application, or in default may commit the insolvent to prison until the day so appointed. (pp. 25, 349, 382, *ante*).

*Proceedings  
where insolvent  
does not apply.  
Ib. s. 146.*

**149.** If the insolvent shall not within six months after sequestration have applied for his certificate a judge may on the application of the trustee or any creditor require the said insolvent and (in case of his refusal or neglect) may compel him by warrant to appear before the court ; and thereupon and from thenceforth the court may grant refuse or suspend his certificate and punish or otherwise deal with such insolvent as if the certificate had been applied for by him. (p. 383, *ante*).

*Duty of trustee  
as to after  
acquired  
property.  
Ib. s. 147.*

**150.** If an insolvent before he obtains his certificate becomes seised possessed or entitled of or to any property, the trustee shall if directed by resolution of a general meeting of creditors or by the committee of inspection apply to the court upon notice to the insolvent and such other persons (if any) as the court may direct for an order directing that such property shall be dealt with under this Act and applied in payment of the creditors ; and the court may make such order thereon, but the court shall in doing so have such regard to the rights of creditors of

the insolvent whose debts may have been incurred since the sequestration **SECS. 150-52.** as it may deem just. (p. 214, *ante*).

*Insolvency  
Statute 1871.*

**151.** Any assignee or trustee becoming insolvent and being indebted to the estate of which he was assignee or trustee in respect of any sum of money improperly retained or employed by him if he shall obtain his certificate and allowance thereof shall not be discharged thereby as to his future effects in respect of the said debt. (pp. 187, 280, 399, *ante*).

When insolvent  
assignee not  
discharged as to,  
his future  
effects.  
*Ib. s. 148.*

**152.** Any person whose certificate has been granted under the law in force in Victoria previous to the passing of the "*Insolvency Statute 1871*" relating to insolvency, but who has not obtained the confirmation of such certificate at the next sitting of the Supreme Court in its insolvency jurisdiction after the granting thereof, may apply to the Supreme Court for an order confirming the grant of such certificate and the Supreme Court may make such order, and such order of confirmation shall have the same force and effect as if the same had been made at the next sitting of the Supreme Court after the grant of such certificate.

Certificates  
under old law.  
*Ib. s. 149.*

Any person whose certificate has been granted previous to such time aforesaid by the chief or other commissioner of insolvent estates but who upon appeal to the Supreme Court has had such certificate refused may apply to the court at Melbourne upon giving such notice as the rules may direct, and the court may, having regard to the grounds of the refusal of the certificate and the period which has elapsed since such refusal, grant or further suspend any such certificate for such period and upon such terms (if any) as the court may deem just. Every certificate granted under the provisions of this section shall be in the same form and have the same effect as any certificate granted under the law in force in Victoria at the time any such certificate was refused.

Any person whose certificate has been refused under the law relating to insolvency in force in Victoria before the passing of the *Insolvency Statute 1871* but who not having appealed to the Supreme Court against such refusal cannot avail himself of the rider to the Act of the Governor and Legislative Council of New South Wales made and passed in the tenth year of the reign of Her present Majesty intituled "*An Act to remove Difficulties in the Disposal Administration and Distribution of Insolvent Estates*" or of the provisions of the one hundred and ninth section of the "*Insolvency Statute 1865*" may apply to the court at Melbourne subject to giving such notice as the rules may direct for an order granting him a certificate and the court shall having regard to the

*10 Vict. No. 14.*

**SECS. 152-53.** grounds of the refusal of the certificate and the period which has elapsed since such refusal grant or further suspend any such certificate for such period and upon such terms (if any) as the court may deem just. Every certificate granted under the provisions of this section shall be in the same form and have the same effect as any certificate granted under the law in force in Victoria at the time any such certificate was refused. (pp. 401, 402, *ante*).

*Insolvency  
Statute 1871.*

#### PART IX.—LIQUIDATION BY ARRANGEMENT.

*Regulations as  
to liquidation by  
arrangement.  
Ib. s. 150.  
See 32 & 33 Vict  
c. 71 s. 125.*

**153.** The following regulations shall be made with respect to the liquidation by arrangement of the affairs of the debtor :—(pp. 411 to 427, *ante*).

(1.) A debtor unable to pay his debts may summon a general meeting of his creditors, and such meeting may, by an extraordinary resolution as hereinafter defined, declare that the affairs of the debtor are to be liquidated by arrangement and not in insolvency, and may at that or some subsequent meeting, held at an interval of not more than a week, by an ordinary resolution appoint a trustee, with or without a committee of inspection. (pp. 412, 421, *ante*).

(II.) All the provisions of this Act relating to the meeting for election of a trustee and to other meetings of creditors including the description of creditors entitled to vote at such meetings, and the debts in respect of which they are entitled to vote, shall apply respectively to the said meeting of creditors and to subsequent meetings of creditors for the purposes of this section, subject to the following modifications :—(p. 423, *ante*).

(a) That every such meeting shall be presided over by such chairman as the meeting may elect ; and

(b) That no creditor shall be entitled to vote until he has proved by a statutory declaration a debt provable in insolvency to be due to him, and the amount of such debt, with any prescribed particulars ; and any person wilfully making a false declaration in relation to such debt shall be guilty of a misdemeanor. (pp. 28, 423, *ante*).

(c) An extraordinary resolution shall be a resolution agreed to by a majority in number and value of the



creditors of the debtor appearing on the statement hereinafter mentioned. (pp. 163, 412, *ante*).

SEC. 153.  
*Insolvency  
Statute 1871.*

- (iii.) The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the meeting at which the extraordinary resolution is passed, and shall answer any inquiries made of him, and he, or if he is so prevented from being at such meeting some one on his behalf, shall produce to the meeting a statement in the prescribed form verified by the affidavit or declaration of the debtor showing the whole of his assets and debts, and the names and addresses of the creditors to whom his debts are due. And where a debt is on a bill of exchange or promissory note the holder of which is then unknown the amount of such bill or note the date when the same will fall due and the name of the acceptor or person to whom the same is payable and of the last-known holder shall be stated. (pp. 415, 416, *ante*).
- (iv.) The extraordinary resolution, together with the statement of the assets and debts of the debtor, and the name of the trustee appointed, and of the members (if any) of the committee of inspection, shall be presented to the chief clerk and it shall be his duty to inquire whether such resolution has been passed in manner directed by this section; but if satisfied that it was so passed, and that a trustee has been appointed with or without a committee of inspection, he shall forthwith register the resolution and the statement of the assets and debts of the debtor, and such resolution and statement shall be open for inspection on the prescribed conditions, and the liquidation by arrangement shall be deemed to have commenced as from the date of the appointment of the trustee. (pp. 421, 424, *ante*).
- (v.) All the property of the debtor shall, from and after the date of the appointment of a trustee, vest in such trustee under a liquidation by arrangement and be divisible amongst the creditors, and all such settlements conveyances transfers charges payments obligations and proceedings as would be void against the trustee in the case of sequestration shall be void against the trustee in the case of liquidation by arrangement. (p. 422, *ante*).
- (vi.) The certificate of the chief clerk in respect of the appoint-

**SEC. 153.**

*Insolvency  
Statute 1871.*

ment of any trustee in the case of a liquidation by arrangement shall be conclusive evidence of his appointment. (p. 422, *ante*).

- (vii.) The trustee under a liquidation shall have the same powers and perform the same duties as a trustee under sequestration, and the property of the debtor shall be distributed in the same manner as in an insolvency; and with the modification hereinafter mentioned all the provisions of this Act shall, so far as the same are applicable, apply to the case of a liquidation by arrangement in the same manner as if the word "insolvent" included a debtor whose affairs are under liquidation, and the word "sequestration" included liquidation by arrangement; and in construing such provisions the appointment of a trustee under a liquidation shall, according to circumstances, be deemed to be equivalent to and a substitute for the order of sequestration or the service of an order of sequestration. (pp. 60, 346, 413, 422, 423, 461, *ante*).
- (viii.) The creditors at any general meeting may prescribe the bank into which the trustee is to pay any moneys received by him, and the sum which he may retain in his hands. (p. 423, *ante*).
- (ix.) The release of the trustee may be granted by a special resolution of the creditors in general meeting, and the accounts may be audited in pursuance of such resolution at such time and in such manner and upon such terms and conditions as the creditors think fit. (p. 426, *ante*).
- (x.) A discharge may be granted to the debtor by three-fourths in number and value of the creditors who have proved debts, and such discharge shall be in the prescribed form and given in prescribed manner and at the prescribed time, and the trustee shall report to the chief clerk the discharge of the debtor, and a certificate of such discharge given by the chief clerk shall have the same effect as a certificate of discharge given to an insolvent under this Act, but any such discharge may be set aside by the court upon the application of any creditor if it appears that the same has been obtained by fraud or by giving any preference to one creditor over another or if the debtor has been guilty of any felony or misdemeanor under this Act. (pp. 425, 426, *ante*).

- (XI.) The provisions of Part VIII. of this Act shall not apply to a SECS. 153-54.

debtor whose affairs are under liquidation under this Part of this Act, but if such debtor shall not have obtained his discharge within three years from the commencement of the liquidation any balance remaining unpaid at the expiration of such period in respect of any debt proved under the liquidation (but without interest in the meantime) shall be deemed to be a subsisting debt in the nature of a judgment debt, and subject to the rights of any persons who have become creditors of the debtor since the commencement of the liquidation may with the sanction of the court be enforced against any property of the debtor, but to the extent only and at the time and in the manner directed by the court, and after giving such notice as may be prescribed or ordered by the court and save as herein provided no action or suit shall be commenced or carried on against any debtor whose affairs are liquidated by arrangement under this Part of this Act for a debt provable under the liquidation. (pp. 346, 422, 423, 461, *ante*).

*Insolvency  
Statute 1871.*

- (XII.) Rules of court may be made in relation to proceedings on the occasion of liquidation by arrangement in the same manner and to the same extent and of the same authority as in respect of proceedings under a sequestration. (p. 424, *ante*).

- (XIII.) If it appear to the court on satisfactory evidence that the liquidation by arrangement cannot, in consequence of legal difficulties or of there being no trustee for the time being or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may on the petition of the trustee or of any creditor whose debt amounts to fifty pounds and upwards sequester the property of the debtor and proceedings may be had accordingly. (pp. 82, 427, *ante*).

- (XIV.) Where no committee of inspection is appointed the trustee may act on his own discretion in cases where he would otherwise have been bound to refer to such committee. (p. 421, *ante*).

PART X.—COMPOSITION WITH CREDITORS. (PP. 411 TO 439, *ante*).

154. The creditors of a debtor unable to pay his debts may, without any proceedings of insolvency, by an extraordinary resolution as herein-  
*Regulations as  
to composition  
with creditors.*

**SEC. 154.** after defined, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor. (p. 412, *ante*).

*Insolvency  
Statute 1871  
s. 151.*

*See 32 & 33 Vict.  
c. 71 s. 126.*

*Affected by s. 73  
Act of 1897.*

An extraordinary resolution of creditors shall be a resolution which has been passed by three-fourths in number and value of the creditors of the debtor, appearing on the statement hereinafter mentioned, assembled or represented at a general meeting to be held in the manner prescribed, of which notice has been given in the prescribed manner and has been confirmed by a majority in number and value of the said creditors assembled or represented at a subsequent general meeting of which notice has been given in the prescribed manner and held at an interval of not less than seven days nor more than fourteen days from the date of the meeting at which such resolution was first passed. (pp. 163, 412, *ante*).

The debtor unless prevented by sickness or other cause satisfactory to such meetings shall be present at both the said meetings, and shall answer any inquiries made of him, and he or if he is so prevented from being at such meetings some one on his behalf shall produce to the first meeting a statement verified by the affidavit or declaration of the debtor showing the whole of his assets and debts and the names and addresses of the creditors to whom such debts respectively are due. (pp. 415, 416, *ante*).

The extraordinary resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the chief clerk, and it shall be his duty to inquire whether such resolution has been passed in manner directed by this section; and if satisfied that it had been so passed he shall forthwith register the resolution and statement of assets and debts, but until such registration has taken place such resolution shall be of no validity, and any creditor of the debtor may inspect such statement at prescribed times and on payment of such fee (if any) as may be prescribed. (pp. 430, 431, *ante*).

The creditors may by an extraordinary resolution add to or vary the provisions of any composition previously accepted by them without prejudice to any persons taking interests under such provisions who do not assent to such additions or variations, and any such extraordinary resolution shall be presented to the chief clerk in the same manner and with the same consequences as the extraordinary resolution by which the composition was accepted in the first instance. (p. 434, *ante*).

The provisions of a composition accepted by an extraordinary resolution in pursuance of this Part of this Act shall be binding on all the creditors whose names and addresses and the amount of the debts due

to whom are shown in the statement of the debtor produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors. (p. 434, *ante*). SECS. 154-56.  
*Insolvency  
Statute 1871.*

Where a debt arises on a bill of exchange or promissory note if the debtor is ignorant of the holder of any such bill of exchange or promissory note he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor or person to whom it is payable, and any other particulars within his knowledge respecting the same, and the insertion of such particulars shall be deemed a sufficient description of the creditor of the debtor in respect of such debt; and any mistake made inadvertently by a debtor in the statement of his debts may be corrected after the prescribed notice has been given with the consent of a general meeting of his creditors. (pp. 416, 417, *ante*).

The provisions of any composition made in pursuance of this section may be enforced by the court on a motion made in a summary manner by any person interested, and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court. (p. 437, *ante*).

Rules of court may be made in relation to proceedings on the occasion of the acceptance of a composition by an extraordinary resolution of creditors in the same manner and to the same extent and of the same authority as in respect of proceedings in insolvency.

If it appear to the court on satisfactory evidence that a composition under this Part of this Act cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or ought not to proceed on account of any fraud on the part of the debtor or any creditor or other person, the court may sequester the property of the debtor, and proceedings may be had accordingly. (pp. 82, 436, 438, *ante*).

**155.** The registration by the chief clerk of a resolution of the creditors on the occasion of the liquidation by arrangement under Part IX. of this Act, or of a resolution by the creditors on the occasion of a composition under this Part of this Act, shall, in the absence of fraud, be conclusive evidence that such resolutions respectively were duly passed and all the requisitions of this Act in respect of such resolutions complied with. (pp. 418, 425, 434, *ante*). *Registration of  
resolutions of  
creditors  
conclusive in  
certain cases.  
Ib. s. 152.  
82 & 38 Vict.  
c. 71 s. 127.*

#### PART XI.—OFFENCES AGAINST THE INSOLVENT LAW.

**156.** As to persons other than the insolvent the following provisions shall be made:—(pp. 451 to 453, *ante*).

**SEC. 156.**

*Insolvency  
Statute 1871  
s. 153.*

Concealing  
insolvent's  
effects.

Persons forging  
seal &c. guilty of  
felony.

As to offence  
of removing  
embezzling &c.  
any property  
under attach-  
ment.

As to offence  
of knowingly  
receiving any  
fraudulent  
alienation &c.  
from insolvent.

Inserting false  
advertisement.

- (i.) Any person who shall wilfully conceal any real or personal estate of an insolvent with intent to defraud his creditors shall be deemed guilty of a misdemeanor, and on conviction thereof shall suffer imprisonment with or without hard labour for any period not exceeding three years. (p. 451 *ante*).
- (ii.) Every person who shall forge the seal or any order certificate or process of the court or who shall serve or enforce any such forged order or process knowing the same to be forged, or deliver or cause to be delivered to any person any paper falsely purporting to be the original or a copy of any summons certificate order warrant or other process of the court or a judge, or who shall act or profess to act under any false colour or pretence of such order warrant or other process shall be guilty of a misdemeanor, and being convicted thereof shall be imprisoned with or without hard labour for any term not exceeding three years. (p. 451, *ante*).
- (iii.) If any person shall dispose of receive remove retain conceal or embezzle any property moneys or securities for money belonging to any insolvent estate which have been attached knowing the same to have been so attached and with intent to defeat the said attachment, or shall hinder or obstruct or endeavour to hinder or obstruct the messenger or other person authorized to make the same, such person shall on conviction thereof before the court or any two justices suffer imprisonment with or without hard labour for any period not exceeding six months. (pp. 28, 452, *ante*).
- (iv.) If any person shall receive or accept any property from the insolvent with intent to defraud the creditors of the insolvent such person shall be deemed guilty of a misdemeanor, and on conviction thereof suffer imprisonment with or without hard labour for any period not exceeding three years. (p. 452, *ante*).
- (v.) Any person who shall insert or cause to be inserted in the *Government Gazette* or in any newspaper any advertisement purporting to be under this Act without authority or knowing the same to be false in any material particular shall be guilty of a misdemeanor, and on conviction thereof shall suffer imprisonment for any period not exceeding three years. (p. 452, *ante*).

- (vi.) If any creditor insolvent or other person in any insolvency or liquidation by arrangement or composition with creditors in pursuance of this Act wilfully and with intent to defraud makes any false claim, or any proof declaration or statement of account which is untrue in any material particular, he shall be guilty of a misdemeanor, punishable with imprisonment not exceeding three years with or without hard labour. (p. 452, *ante*).

*Insolvency  
Statute 1871.  
False claim &c.  
a misdemeanor.  
32 & 33 Vict.  
c. 62 s. 14.*

**157.** Any insolvent, and any person whose affairs are liquidated by arrangement in pursuance of Part IX. of this Act, shall in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding three years, with or without hard labour, that is to say:— (pp. 453 to 459, *ante*).

*Punishment of  
fraudulent  
debtors.  
Ib. s. 154.  
See ib. s. 11.*

- (I.) If he does not, to the best of his knowledge and belief, fully and truly discover to the court upon any examination under this Act or to the trustee administering his estate for the benefit of his creditors all his property, real and personal, and how, and to whom, and for what consideration and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his business or trade (if any), or laid out in the ordinary expense of his family, unless the jury is satisfied that he had no intent to defraud: (p. 453, *ante*).
- (II.) If he does not deliver up to such trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless the jury is satisfied that he had no intent to defraud: (p. 454, *ante*).
- (III.) If he does not deliver up to such trustee, or as he directs, all books documents papers and writings in his custody or under his control relating to his property or affairs, unless the jury is satisfied that he had no intent to defraud: (p. 454, *ante*).
- (IV.) If before or after sequestration or the commencement of the liquidation, he conceals any part of his property to the value of ten pounds or upwards, or conceals any debt due to or from him, unless the jury is satisfied that he had no intent to defraud: (p. 454, *ante*).

**SEC. 157.**

*Insolvency  
Statute 1871.*

- (v.) If before or after sequestration or the commencement of the liquidation, he fraudulently removes any part of his property of the value of ten pounds or upwards : (p. 455, *ante*).
- (vi.) If he makes any material omission in any statement relating to his affairs, unless the jury is satisfied that he had no intent to defraud : (p. 455, *ante*).
- (vii.) If, knowing or believing that a false debt has been proved by any person under the insolvency or liquidation, he fail for a period of a month to inform such trustee as aforesaid thereof : (p. 455, *ante*).
- (viii.) If after sequestration or the commencement of the liquidation, he prevents the production of any book document paper or writing affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law : (p. 455, *ante*). .
- (ix.) If before or after sequestration or the commencement of the liquidation, he conceals destroys mutilates or falsifies or is privy to the concealment destruction mutilation or falsification of any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law : (p. 455, *ante*).
- (x.) If before or after sequestration or the commencement of the liquidation, he makes or his privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law : (p. 456, *ante*).
- (xi.) If before or after sequestration or the commencement of the liquidation, he fraudulently parts with alters or makes any omission, or is privy to the fraudulently parting with altering or making any omission in any document affecting or relating to his property or affairs : (p. 456, *ante*).
- (xii.) If after sequestration or the commencement of the liquidation, or at any meeting of his creditors within four months next before sequestration or the commencement of the liquidation, he attempts to account for any part of his property by fictitious losses or expenses : (p. 456, *ante*).



(xiii.) If within four months next before sequestration or the commencement of the liquidation, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same : (p. 457, *ante*). SECS. 157-60.  
*Insolvency  
Statute 1871.*

(xiv.) If within four months next before sequestration or the commencement of the liquidation, he being a trader obtains, under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit, and has not paid for the same, unless the jury is satisfied that he had no intent to defraud : (p. 457, *ante*).

(xv.) If within four months next before sequestration or the commencement of the liquidation, he pawns pledges or disposes of otherwise than in the ordinary way of his trade or business any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud : (p. 458, *ante*).

(xvi.) If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to any agreement with reference to his affairs or his insolvency or liquidation. (p. 459, *ante*).

158. If in any composition with creditors under Part X. of this Act any debtor make at any meeting of creditors any false statement or any material omission in any statement relating to his affairs, or if he be guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to any agreement with reference to his affairs or to such composition, he shall be guilty of a misdemeanor and may be imprisoned for any term not exceeding three years with or without hard labour. (p. 439, *ante*). Penalty for  
fraud in cases of  
composition.  
*Ib. s. 155.*

159. If any insolvent or person who has his affairs liquidated by arrangement after sequestration or the commencement of the liquidation, or within four months before such sequestration or commencement quits Victoria and takes with him, or attempts or makes preparation for quitting Victoria and for taking with him any part of his property to the amount of twenty pounds or upwards which ought by law to be divided amongst his creditors, he shall (unless the jury is satisfied that he had no intent to defraud) be guilty of felony, punishable with imprisonment for a time not exceeding three years with or without hard labour. (p. 461, *ante*). Penalty for  
absconding with  
property.  
*Ib. s. 156.  
32 & 33 Vict.  
c. 62 s. 12.*

160. Any person shall in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be im- Penalty on  
fraudulently  
obtaining credit  
&c.  
34

**SECS. 160-63.** prisoned for any time not exceeding one year with or without hard labour, that is to say :—

*Insolvency  
Statute 1871*  
s. 157.  
32 & 33 Vict.  
c. 62 s. 13.

- (I.) If incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud : (p. 462, *ante*).
- (II.) If he has, with intent to defraud his creditors, or any of them, made or caused to be made any gift delivery or transfer of or any charge on his property : (pp. 462, 463, *ante*).
- (III.) If he has, with intent to defraud his creditors, concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him. (p. 462, *ante*).

Debts incurred  
by fraud.  
*Ib.* s. 158.  
*Ib.* s. 15.

**161.** Where a debtor makes any arrangement or composition with his creditors under the provisions of this Act he shall remain liable for the unpaid balance of any debt which he incurred or increased, or whereof before the date of the arrangement or composition he obtained forbearance, by any fraud, provided the defrauded creditor has not assented to the arrangement or composition otherwise than by proving his debt and accepting dividends. (pp. 439, 463, *ante*).

Councillors and  
others  
disqualified by  
arrangements.  
*Ib.* s. 160.  
See *ib.* s. 21.

**162.** Where under the provisions of any Act now or hereafter in force the members of any board or of the council of any city town borough or shire or of other public body are rendered incapable by reason of insolvency, such incapacity shall extend to every arrangement or composition by every such member with his creditors under this Act (p. 350, *ante*).

Punishments  
under this Act  
cumulative.  
*Ib.* s. 161.  
*Ib.* s. 23.

**163.** Where any person is liable under any other Act of Parliament or at common law to any punishment or penalty for any offence made punishable by this Act, such person may be proceeded against under such other Act of Parliament or at common law or under this Act, so that he be not punished twice for the same offence. (p. 28, *ante*).

## Section 2.

## SCHEDULE.

Date of Act.	Title of Act.	Extent of Repeal.
34 Vict. No. 379 ...	" <i>Insolvency Statute 1871</i> " ...	So much as is not already repealed.
35 Vict. No. 411 ...	" <i>An Act to amend the ' Insolvency Statute 1871 ' "</i>	The whole.

# THE INSOLVENCY ACT 1897

No. 1513.

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[The figures at the end of the sections relate to the pages of the text where the subject is referred to.]

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## AN ACT TO AMEND THE LAW RELATING TO INSOLVENCY.

[6th September, 1897.]

BE it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say) :—

1. (1) This Act may be cited as the *Insolvency Act 1897*, and shall be read and construed as one with the *Insolvency Act 1890* (hereinafter called the Principal Act), and this Act and the Principal Act and any Act amending the said Act or this Act may be cited together as the Insolvency Acts. Short title and construction.

(2) This Act shall come into operation on the first day of January Commencement. One thousand eight hundred and ninety-eight.

(3) This Act is divided into Parts as follows :—

Division.

PART I.—Jurisdiction and Powers of Courts.

PART II.—Assignees and Trustees.

PART III.—Committee of Inspection.

PART IV.—Official Accountant.

PART V.—Compositions.

PART VI.—Deeds of Arrangement.

PART VII.—Certificate of Discharge.

PART VIII.—Settlements.

PART IX.—Petitions.

PART X.—Examinations.

PART XI.—Deceased Persons' Estates.

PART XII.—Supplemental.

**SECS. 2-5.** 2. The Act mentioned in the First Schedule to this Act to the extent to which the same is in and by the said Schedule expressed to be repealed is hereby repealed accordingly.

Repeal and  
amendment.  
First Schedule.

#### PART I.—JURISDICTION AND POWERS OF COURT.

Power of judge  
in chambers.

3. Subject to the provisions of this Act a judge may exercise in chambers the whole or any part of the jurisdiction of the court. Provided that the following matters and applications shall be heard and determined in open court, namely :—(p. 91, *ante*).

Exceptions.

- (a) Examinations under Part VII. of the Principal Act :
- (b) Applications for certificates of discharge :
- (c) Applications to consider and the consideration of a composition :
- (d) Applications to set aside or avoid any settlement conveyance transfer security or payment or to declare for or against the title of trustees to any property adversely claimed :
- (e) Applications for the committal of any person to prison : (pp. 25, 37, *ante*).
- (f) Appeals against the rejection of a proof or applications to expunge or reduce a proof where the amount of proof exceeds Two hundred pounds :
- (g) Applications for the trial of issues of fact with a jury and the trial of such issues : (p. 9, *ante*).

Adjournment  
from chambers  
to court and  
*vice versa*.

4. Subject to the provisions of this Act any matter or application may at any time if a judge thinks fit be adjourned from chambers to court or from court to chambers, and if all the contending parties require any matter or application to be adjourned from chambers into court it shall be so adjourned. (p. 9, *ante*).

General power of  
Insolvency  
Court.

See E. (1883) (46  
& 47 Vict. cap.  
52) s. 102.

5. (1) Subject to the provisions of this Act the court shall have full power to decide all questions of priorities and all other questions whatsoever whether of law or fact which may arise in any case of insolvency coming within the cognizance of the court or which the court deems it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case. (pp. 4, 9, 12, 13, 173, *ante*).

(2) The jurisdiction given by this section shall not be exercised for the purpose of adjudicating upon any claim not arising in the insolvency unless all parties to the proceeding consent thereto or the money or

money's worth in dispute does not in the opinion of the judge exceed in value Five hundred pounds. (pp. 4, 7, 8, *ante*). **SECS. 5-9.**

6. (1) If in any proceeding in the court there arises any question of fact which the parties desire to be tried by a jury instead of by the court itself or which the court thinks ought to be tried by a jury the court may direct such trial by a jury to be had before itself or some other competent court accordingly, and shall settle the form in which such question of fact shall be stated for trial and give all necessary directions for the purpose of such trial. (p. 17, *ante*). Trial of question of fact by a jury. See E. (1883) s. 102 (3).

(2) If such trial take place before the court or in the Supreme Court it shall be had in the same manner as if it were the trial by a jury of an issue of fact in an action in the Supreme Court, and if such trial take place in any other court it shall be had in the manner in which jury trials in ordinary cases are by law held in such court. (p. 18, *ante*). Mode of trial by a jury.

(3) If a trial be had elsewhere than in the court the finding of the jury shall be certified by the associate or other proper officer to the court which shall make such order in the matter as it shall think fit. (p. 18, *ante*). Finding of jury to be certified to the court.

(4) In every case the court before which the trial is had may grant a new trial if it thinks fit, and for such purpose the ordinary rules of practice and procedure in such court shall apply. (p. 18, *ante*). Power to grant new trial.

(5) For the purposes of trials with a jury all the provisions of the *Juries Act* 1890 and any Act amending the same so far as the same relate to civil trials shall apply.

(6) The Chief Clerk shall in relation to all trials with a jury perform the same duties and functions as the Registrar of the County Court performs in relation to the County Court. (p. 18, *ante*).

7. In section one hundred and seventy-nine of the *Justices Act* 1890 the words "(xv.) Offences against any provisions of the laws relating to bankrupts or insolvents" are hereby repealed. (p. 25, *ante*). Offences against Acts may be tried at general sessions.

8. The court may commit any insolvent or other person whom it may believe to have committed or who may be charged before it with the commission of any indictable offence against the Insolvency Acts to take his her or their trial either before the Supreme Court or a court of general sessions and may grant or refuse bail to such insolvent or other person, and for the aforesaid purposes shall have all the powers of a police magistrate. (pp. 25, 349, *ante*). Power to commit for trial.

9. (1) The court may if it thinks fit upon the request of any party to the proceeding transmit any question of law by way of special case Special case.

**SECS. 9-11.** to the Supreme Court which shall have full power to determine the same. The decision of the Supreme Court as certified by the Prothonotary thereof shall be forwarded to and filed in the court whence such special case shall have been transmitted and shall be binding upon the court. (p. 15, *ante*).

(2) In any case in which the court shall in consequence of the opposition of any person or at the instance of any person transmit any question of law by way of special case to the Supreme Court there shall be stated in such special case the name or names of the person or persons at whose instance or in consequence of whose opposition such special case has been transmitted, and such person or persons shall be deemed to be a party or parties thereto. (p. 15, *ante*).

(3) The Supreme Court shall have full power and discretion in respect to the costs of a special case, or may if it think fit reserve the question of such costs for the consideration of the court. (pp. 15, 59, *ante*).

Discretionary powers of the court.

See E. (1883)  
s. 105 (1).

**10.** (1) Subject to the provisions of this Act and to general rules the costs of and incidental to any proceeding under the said Acts shall be in the discretion of the Supreme Court or the court (as the case may be). Provided that where any issue is tried by a jury the costs shall follow the event unless upon application made for good cause shown the judge before whom such issue is tried shall otherwise order. (pp. 48, 49, *ante*).

Power of amendment.

See E. (1883)  
s. 105 (3).

(2) The Supreme Court or the court may at any time allow upon such terms if any as it may think fit to impose any amendments which in the judgment of the Supreme Court or the court ought to be allowed in any proceeding whether there be anything in writing to amend by or not. (pp. 21, 45, 104, *ante*).

See E. (1833)  
s. 105 (4).

(3) Where by the said Acts or by general rules the time for doing any act or thing is limited the Supreme Court or the court (as the case may be) may extend the time either before or after the expiration thereof upon such terms (if any) as such court may think fit to impose. (pp. 47, 48, 119, *ante*).

(4) In awarding costs the Supreme Court or the court may award the same either out of the insolvent estate or against any person or persons as shall seem just. (p. 48, *ante*).

Actions by trustee and insolvent's partners.  
See E. (1883)  
s. 113.

**11.** Where the estate of a member of a partnership is sequestrated the court may authorize the trustee to commence and prosecute any action in the names of the trustee and of the insolvent's partner, and any release by such partner of the debt or demand to which the action

relates shall be void; but notice of the application for authority to commence the action shall be given to such partner and he may show cause against it, and on his application the court may if it thinks fit direct that he shall receive his proper share of the proceeds of the action and if he does not claim any benefit therefrom he shall be indemnified against costs in respect thereof as the court directs. (p. 43, *ante*).

12. Where an insolvent is a contractor in respect of any contract jointly with any person or persons such person or persons may sue or be sued in respect of the contract without a joinder of the insolvent. (p. 43, *ante*).

Actions on joint contracts.  
See E. (1883) s. 114.

13. Any two or more persons being partners or any person carrying on business under a partnership name may take proceedings or be proceeded against under the Insolvency Acts in the name of the firm, but in such cases the Supreme Court or the court may on application by any person interested order the names of the persons who are partners in such firm or the name of such person to be disclosed in such manner and verified on oath or otherwise as the court may direct. (pp. 31, 86, 95, 96, 298, *ante*).

Proceedings in partnership name.  
See E. (1883) s. 115.

14. (1) The court shall not make an order releasing the estate of an insolvent from sequestration under the provisions of section one hundred and thirty-one of the Principal Act unless the offer of composition or security for composition appears to the court to be reasonable or calculated to benefit the general body of creditors. (pp. 22, 404, *ante*).

Amendment of s. 131 of No. 1102.

(2) If at any time default is made in payment of any instalment due in pursuance of the composition or if at any time it appears to the court that the composition cannot proceed without injustice or undue delay or if at any time it appears that the order for release was obtained by fraud the court may if it thinks fit on application by any person interested annul the composition and release and may sequester the debtor's estate but without prejudice to the validity of any sale disposition or payment duly made or thing duly done under or in pursuance of the composition or release. Where the estate of a debtor is sequestered under this sub-section all debts provable in other respects which have been contracted before the date of such sequestration shall be provable in the insolvency. (pp. 82, 408, *ante*).

Power to sequester estate where composition cannot proceed without injustice or delay &c.  
See E. (1883) s. 23.

(3) The annulment of a composition and release and the sequestration of a debtor's estate under this section shall not prejudice or affect the rights or remedies which any other person in good faith would have had in case such annulment had not been made, and any property which the insolvent may have acquired since the order for release was obtained

Saving of rights.

**SECS. 14-17.** and which remains vested in him at the date of such annulment shall vest in the trustee or in some other trustee when duly appointed and confirmed as in an ordinary case of insolvency subject to any *bond fide* encumbrances thereon, and shall first be applied by the trustee in satisfaction of debts incurred by the insolvent since the date of the order granting the release. (p. 408, *ante*).

Summons &c.  
may be made  
returnable at  
place directed by  
judge.  
See No. 1078 s.  
106.

**15.** Any summons issued under the provisions of the Insolvency Acts may be made returnable at such place (to be named in such summons) as a judge may determine in whatever district such place may be. (pp. 40, 357, *ante*).

Judge may  
reserve decision  
and forward it in  
writing for Chief  
Clerk to read.  
See ib. s. 88.

**16.** (1) In any matter in insolvency or proceeding in the court the judge may if he think fit reserve his decision on any question of fact or of law.

(2) Where any judge has so reserved his decision he may give the same at any continuation or adjournment of the court or at any subsequent holding thereof or he may draw up such decision in writing, and having duly signed the same forward it to the Chief Clerk; upon the receipt of such decision in writing such Chief Clerk shall notify the parties or their respective barristers and solicitors of his intention to proceed at some convenient time by him specified to read the same in the court house at which such court is holden or other convenient place, and he shall read the same accordingly, and thereupon such decision shall be of the same force and effect as if given by such judge in open court at the hearing of the matter or proceeding. (p. 46, *ante*).

## PART II.—ASSIGNEES AND TRUSTEES.

### (a) *Appointment and Remuneration.*

Registration of  
persons capable  
of being  
trustees.

**17.** (1) The court may if it think fit on the application of any person order that such person shall be registered as qualified to be appointed to the office of trustee under the Insolvency Acts, and thereupon he shall be registered accordingly by the Chief Clerk in a book to be kept for the purpose; and the court may at any time if it think fit order such registration to be cancelled and no person (except an assignee) who is not so registered shall be capable of being appointed or (unless appointed to such estate before the commencement of this Act) of acting as trustee of any estate in insolvency. (p. 167, *ante*).

Security to be  
given.  
See E. (1883)  
s. 21 (2).

(2) Every person appointed to fill the office of trustee shall give security in manner hereinafter mentioned to the satisfaction of the court, and the court may upon the acceptance in writing of office by



the trustee and on being satisfied that he is duly registered as required SECS. 17, 18. by this Act and that the requisite security has been given make an order confirming his appointment. (pp. 167, 170, 172, *ante*).

(3) Where an order is so made confirming the appointment of any person to fill the office of trustee such person shall cause notice of such confirmation to be forthwith advertised in the *Government Gazette*.

(4) If the court be satisfied upon objection made by the insolvent or any creditor that the appointment has not been made in good faith by a majority of the creditors voting or that his connexion with or relation to the insolvent or his estate or any particular creditor makes it difficult for him to act with impartiality in the interests of the creditors generally or for any other reasonable cause the court may refuse to confirm the appointment. (p. 171, *ante*). Refusal of confirmation of appointment.

(5) The following rules as to security to be given by a trustee shall be observed, namely :—(p. 168, *ante*). Rules as to security.

(a) The security shall be given to such officers or persons and in such manner as the court may from time to time direct. (p. 167, *ante*).

(b) It shall not be necessary that security shall be given in each separate matter ; but security may be given either specially in a particular matter or generally be available for any matter in which a person giving security may be appointed as trustee. (p. 167, *ante*).

(c) The court shall fix the amount and nature of such security and may from time to time as it may think fit either increase or diminish the amount of special or general security which any person is to give. (p. 167, *ante*).

(d) The court may on the application of any person interested direct that the security shall be enforced or realized and the proceeds applied in such manner as the court thinks just.

**18.** Notwithstanding anything contained in this Part or Part VI. of this Act it shall be lawful for the creditors of any insolvent to appoint any person whether a creditor or not of such insolvent to be the trustee of the estate of such insolvent, and if the person so appointed within seven days after such appointment informs the court in writing that he has been so appointed then the court may order that such person on giving such security as the court may fix shall be registered as qualified to be appointed to the office of trustee under the Insolvency Acts in respect only of such estate and thereupon he shall be registered accord- Power to appoint any person as trustee.

**SECS. 18-25.** ingly by the Chief Clerk in a book to be kept for the purpose, and on such registration and until the cancellation of such registration he shall be capable of acting as trustee under the said Acts for such estate. The court may at any time if it thinks fit order that such registration be cancelled. (pp. 157, 169, *ante*).

Solicitation  
by trustee  
prohibited.  
See E. (1883)  
Schedule I.,  
par. 20.

**19.** Where it appears to the satisfaction of the court that any solicitation has been used by or on behalf or with the consent of a trustee in obtaining proxies or in procuring the trusteeship except by the direction of a meeting of creditors the court shall have power if it think fit to order that no remuneration shall be allowed to the person by whom or on whose behalf such solicitation may have been exercised notwithstanding any resolution of the committee of inspection or of the creditors to the contrary. (pp. 24, 66, *ante*).

Remuneration  
of trustees.  
See E. (1883)  
s. 72.

**20.** Where the creditors appoint any person to be trustee of an insolvent's estate his remuneration if any shall be fixed by a resolution of the creditors or if the creditors so resolve by the committee of inspection, and shall be in the nature of a commission or percentage on the net amount realized and available for distribution. (pp. 63, 65, 157, *ante*).

Limit of  
remuneration.

**21.** Except as provided by the Insolvency Acts no trustee shall be entitled to receive out of the estate any remuneration for services rendered by any person to the estate. (p. 63, *ante*).

Power of court  
to reduce  
remuneration.  
See E. (1883)  
s. 72 (2).

**22.** If one-fourth in number or value of the creditors dissent from the resolution fixing the remuneration or the insolvent or any creditor satisfies the court that the remuneration is unnecessarily large, the court shall fix the amount of the remuneration. (p. 64, *ante*).

Resolution to  
express expenses  
covered by  
remuneration.

**23.** The resolution shall express what expenses (if any) the remuneration is to cover, and no liability other than the right of the trustee to receive such remuneration shall attach to the insolvent's estate or to the creditors in respect of any expenses which the remuneration is expressed to cover. (p. 64, *ante*).

Where no  
remuneration  
voted.  
See E. (1883)  
s. 72.

**24.** Where no remuneration has been voted to a trustee he shall be allowed out of the insolvent's estate such proper costs and expenses incurred by him in or about the proceedings in insolvency as the court may allow. (p. 64, *ante*).

Trustee agent  
&c. not to share  
remuneration  
with or of other  
persons.  
See E. (1883)  
s. 72 (5).

**25.** (1) No assignee or trustee shall under any circumstances whatever directly or indirectly make any arrangement for nor shall he or his wife child partner agent clerk barrister and solicitor or servant either directly or indirectly accept from the insolvent or any barrister and solicitor auctioneer or any other person who may be employed about the

insolvency or with whom any contract express or implied may be made SECS. 25-27.  
 in connexion with the insolvency any commission discount share of  
 commission or discount gift or any gift remuneration or pecuniary or  
 other consideration or benefit whatever beyond the remuneration fixed  
 by the creditors or committee of inspection or allowed by the Insolvency  
 Acts and payable out of the estate, nor shall he directly or indirectly  
 make any arrangement for giving up or give up any part of his  
 remuneration to the insolvent or any creditor or any member of the  
 committee of inspection or any barrister and solicitor auctioneer or  
 other person whomsoever that may be employed about the insolvency.

(2) Every assignee and trustee contravening this section and every  
 person who is a party to such contravention shall be guilty of a mis-  
 demeanour. (p. 28, 65, 451, *ante*).

26. The vote of the trustee or of his partner clerk barrister and  
 solicitor or barrister and solicitor's clerk either as a creditor or as a  
 proxy for a creditor shall not be reckoned in the majority required for  
 passing any resolution affecting the remuneration conduct or removal of  
 the trustee. (p. 63, 159, 173, *ante*).

Limitation of  
voting powers of  
a trustee.  
See E. (1883)  
s. 88.

27. (1) Where any trustee receives remuneration for his services as  
 such no payments shall be allowed in consequence or in respect of per-  
 formance by any other person of the ordinary duties which are required  
 by any Act or rules to be performed by himself. (pp. 64, 65, *ante*).

Allowance and  
taxation of costs.  
See E. (1883)  
s. 73.

(2) Where the trustee is a barrister and solicitor the remuneration  
 for his services as trustee shall include all professional services unless it  
 shall be otherwise provided on his appointment. (p. 65, *ante*).

(3) All bills and charges of barristers and solicitors accountants  
 auctioneers brokers and other persons not being trustees shall be taxed  
 by the Chief Clerk, and no payment in respect thereof shall be allowed  
 in the trustee's accounts without proof of such taxation having been  
 made. The Chief Clerk shall satisfy himself before passing such bills  
 and charges that the employment of such barristers and solicitors account-  
 ants auctioneers brokers and other persons in respect of the particular  
 matters out of which such charges arise was reasonable and necessary  
 and shall not allow any costs for preparing or taxing the same. (pp.  
 50, 52, 53, 64, 66, 181, *ante*).

(4) Every such person as is hereinbefore mentioned shall on written  
 request by the trustee (which request the trustee shall make a sufficient  
 time before declaring a dividend) deliver his bill of costs or charges to  
 the Chief Clerk for taxation, and if he fails to do so within ten days

See E. (1883)  
s. 73 (4).

**SECS. 27-30.** after receipt of the request or such further time as the court on application may grant the trustee shall declare and distribute the dividend without regard to any claim by him and thereupon any such claim shall be forfeited as well against the trustee personally as against the estate. (pp. 51, 323, *ante*).

(5) The court may refer for taxation any bill of costs or charges to the Prothonotary or a taxing officer of the Supreme or any other Court, and in respect of such costs or charges the decision of the Prothonotary or taxing officer shall be deemed to be the decision of the Chief Clerk and be subject to appeal to the court.

(6) An appeal shall lie to the court from a decision of the Chief Clerk in allowing or disallowing any item on the motion of the assignee or trustee or any creditor of the estate or any person interested. (p. 51, *ante*).

Amendment of  
section 64 of  
Principal Act.  
See E. (1883)  
s. 84 (2).

**28.** In sub-section (1.) of section sixty-four of the Principal Act after the word "trustee" at the end of such sub-section there shall be inserted the words following, that is to say, "or failing to give security or not being approved of by the court." (pp. 157, 169, *ante*).

Office of trustee  
vacated by  
insolvency.  
See E. (1883) s.  
85.

**29.** If the estate of a trustee be sequestrated in insolvency or if he make a composition with his creditors or liquidate his affairs by arrangement he shall thereby vacate his office as trustee. (p. 173, *ante*).

Removal of  
trustee.  
See E. (1883) s.  
86.

**30.** (1) The creditors may by ordinary resolution at a meeting specially called for that purpose of which seven days' notice has been given remove the trustee appointed by them or by the committee of inspection, and may at the same or any subsequent meeting appoint another person to fill the vacancy as hereinafter provided in case of a vacancy in the office of trustee. (p. 173, *ante*).

See E. (1883) s.  
86 (2).  
See E. (1890) s.  
19.

(2) The court may remove any assignee or trustee for misconduct or neglect or omission in the performance of his duties or for absence from the colony or in any case in which the court is of opinion that the trustee is by reason of lunacy or continued sickness or absence incapable of performing his duties or that his connexion with or relation to the insolvent or his estate or any particular creditor might make it difficult for him to act with impartiality in the interests of the creditors generally or where in any other matter he has been removed from office on the ground of misconduct or for any other reasonable cause. (p. 172, *ante*).

(3) The Chief Clerk shall cause notice of every order made for the

removal of any assignee or trustee to be forthwith advertised in the *Government Gazette*. (p. 174, *ante*). **SECS. 30-33.**

**31.** (1) If a vacancy occurs in the office of a trustee the creditors in general meeting may appoint a person to fill the vacancy, and thereupon the same proceedings shall be taken as in the case of a first appointment. (p. 169, *ante*). Proceedings in case of vacancy in office of trustee. See E. (1883) s. 87.

(2) The Chief Clerk shall on the requisition of any creditor or the insolvent summon a meeting for the purpose of filling any such vacancy. (pp. 155, 169, *ante*).

(3) If the creditors do not within three weeks after the occurrence of a vacancy appoint a person to fill the vacancy the Chief Clerk shall report the matter to the court and the court may appoint a trustee, but in such case the creditors or the committee of inspection shall have the same power of appointing a trustee as in the case of a first appointment. (pp. 170, 198, *ante*).

(4) During any vacancy in the office of assignee or trustee the court may appoint any assignee to act as assignee or trustee as the case may be. (p. 170, *ante*).

(b) *Control.*

**32.** (1) The court shall take cognizance of the conduct of assignees and trustees; and in the event of the court having any reasonable ground for believing that any assignee or trustee is not faithfully performing his duties and duly observing all the requirements imposed on him by any Act rules or otherwise with respect to the performance of his duties or is omitting to use reasonable diligence with respect to the performance of his duties, or in the event of any complaint being made to the court in regard thereto by any creditor or the insolvent or any person interested, the court shall inquire into the matter and take such action thereon as may be deemed expedient. (pp. 164, 176, *ante*). Control of court over assignees and trustees. See E. (1883) s. 91.

(2) The court may at any time require an assignee or trustee to answer any inquiry made of him in relation to any insolvency in which such assignee or trustee is engaged and may if it think fit examine on oath such assignee or trustee or any person concerning the insolvency. The court may also direct an investigation to be made of the books accounts and vouchers of the assignee or trustee by the Official Accountant. (pp. 163, 176, *ante*). Trustee to answer inquiries. See E. (1883) s. 91 (2) and (3).

**33.** The court upon the application of any person interested or without any application may order any assignee or trustee to lodge in court any books accounts documents or vouchers in his possession or under Court's power over books &c. in possession of trustee.

**SECS. 33-38.** his control in relation to or in connexion with any estate of which he is assignee or trustee, and such books documents and vouchers may be retained or dealt with as the court may think fit. (pp. 164, 177, *ante*).

Meeting of  
creditors to be  
summoned by  
trustee.  
See E. (1883)  
s. 89 (2).

**34.** (1) The trustee may from time to time summon general meetings of the creditors for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors by resolution either at the meeting appointing the trustee or otherwise may direct. (pp. 155, 158, *ante*).

Request to sum-  
mon meeting.  
See E. (1890)  
s. 18.

(2) It shall be lawful for any creditor with the concurrence of one-sixth of the creditors in number or value who have proved (including himself) at any time to request the trustee to summon a meeting of the creditors, and the trustee shall summon such meeting accordingly within fourteen days; the person at whose instance the meeting is summoned shall on making such request deposit with the trustee a sum sufficient in the opinion of either the trustee or the Chief Clerk to pay the costs of summoning the meeting, and such sum shall be repaid to him out of the estate if the creditors or the court so direct. (p. 155, *ante*).

Subject to Acts  
trustee to use his  
own discretion.  
See E. (1883)  
s. 89 (4).

**35.** Subject to the provisions of the Insolvency Acts the trustee shall use his own discretion in the management of the estate and its distribution among the creditors. (p. 176, *ante*).

Appeal to court  
against trustee.  
See E. (1883)  
s. 90.

**36.** If the insolvent or any of the creditors or any person interested is aggrieved by any act or decision of the trustee he may apply to the court, and the court may confirm or reverse or modify the act or decision complained of and make such order in the premises as shall be just. (p. 176, *ante*).

Meeting to con-  
sider the con-  
duct of trustee.

**37.** Where one-sixth of the creditors in number or value who have proved desire that a general meeting of the creditors may be summoned to consider the propriety of removing a trustee such meeting may be summoned by a member of the committee of inspection, or by the Chief Clerk on the deposit of a sum which he considers sufficient to defray the expenses of summoning such meeting and such sum shall be repaid to them out of the estate if the creditors or the court so direct. (p. 173, *ante*).

Trustee to  
furnish list of  
creditors.  
See E. (1890)  
s. 16.

**38.** The trustee shall whenever required by any creditor so to do furnish and transmit to such creditor by post a list of the creditors' showing in such list the amount of debt due to each of such creditors and showing which creditors have proved. The trustee shall be entitled to charge such creditor for such list the sum of Threepence per folio of seventy-two words together with the cost of the postage thereof. (p. 179, *ante*).

**39.** It shall be lawful for any creditor with the concurrence of one-sixth of the creditors in number or value who have proved (including himself) at any time to call upon the trustee to furnish and transmit to the creditors in prescribed form a statement of the accounts up to the date of such notice, and the trustee shall upon receipt of such notice furnish and transmit such statement of the accounts. Provided the person at whose instance the accounts are furnished shall deposit with the trustee a sum sufficient or in the event of a dispute a sum which in the opinion of the Chief Clerk is sufficient to pay the costs of furnishing and transmitting the accounts, such sum to be repaid to such person out of the estate if the creditors by resolution or the court so direct. (p. 338, *ante*).

SECS. 39-42.

Statement of  
accounts.  
See E. (1880)  
s. 17.(c) *Duties and Powers.*

**40.** The trustee shall investigate the books accounts and documents of the insolvent, prepare therefrom a schedule and balance-sheet of the insolvent's property dealings and transactions as far as the said books and accounts offer materials for preparing the same, and file such schedule and balance-sheet with the Chief Clerk as soon as practicable after the order for sequestration and not later than one month thereafter or within such further time as upon application the court may allow. (p. 179, *ante*).

To prepare  
schedule and  
balance-sheet  
of insolvent's  
property.

**41.** (1) The trustee shall also together with the said schedule and balance-sheet file a report as to the keeping of accounts by the insolvent, whether the insolvent has rendered and given him all necessary assistance and information in his power, whether any books accounts and documents appear to have been missing or to have been falsified or destroyed, the cause of the insolvency, and whether any property appears unaccounted for. (p. 179, *ante*).

Report as to  
insolvent's  
accounts.

(2) The trustee shall also at any time make such investigations and reports in connexion with the insolvency as the court may direct.

(d) *Distribution of Property.*

**42.** (1) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise the trustee shall with all convenient speed declare and distribute dividends amongst the creditors who have proved their debts. (p. 318, *ante*).

Declaration and  
distribution of  
dividends.  
See E. (1883)  
s. 58.

(2) The first dividend (if any) shall be declared and distributed within four months after the order for sequestration unless the trustee satisfies the committee of inspection or the court that there is or was

**SECS. 42-44.** sufficient reason for postponing the distribution to a later date. (p. 318, *ante*).

(3) Subsequent dividends shall in the absence of sufficient reason to the contrary be declared and distributed at intervals of not more than three months. (p. 318, *ante*).

(4) Before declaring a dividend the trustee shall (in addition to the *Gazette* notice) cause notice of his intention to do so to be advertised in one of the Melbourne daily newspapers and also in some local newspaper where the insolvent last carried on business or resided previous to insolvency if not in Melbourne, and shall also send reasonable notice thereof in writing to each creditor mentioned in the insolvent's schedule or otherwise known to the trustee who has not proved his debt. (p. 319, *ante*).

(5) Before declaring a dividend the trustee shall file with the Chief Clerk a statutory declaration that he has complied with the provisions of the last preceding sub-section, and thereupon the Chief Clerk shall by cheque drawn upon the Insolvency Estates Account pay into such bank as he may select in the name of the trustee as trustee in insolvency of the particular estate a sum sufficient to cover the dividend proposed to be declared, and thereupon the trustee shall forthwith declare the dividend. (p. 320, *ante*).

(6) When the trustee has declared a dividend he shall send to each creditor who has proved a notice in writing showing the amount of the dividend and when and how it is payable and a statement in the prescribed form as to the particulars of the estate.

Trustee's  
payments out  
of bank.

**43.** All payments by the trustee out of any bank account shall be made by cheque payable to order, and every cheque shall have marked or written on the face of it the name of the estate and shall be signed by the trustee and shall be countersigned by at least one member of the committee of inspection (if any) if the creditors so direct. (p. 335, *ante*).

Joint and sep-  
arate dividends.  
See E. (1893) s.  
59.

**44.** (1) Where the estate of one partner of a firm is sequestrated a creditor to whom the insolvent is indebted jointly with the other partners of the firm or any of them shall not receive any dividend out of the separate estate of the insolvent until all the separate creditors have received the full amount of their respective debts. (p. 327, *ante*).

(2) Where joint and separate estates are being administered dividends of the joint and separate estates shall subject to any order to the contrary that may be made by the court on the application of any person interested be declared together, and the expenses of and incident to



such dividends shall be fairly apportioned by the trustee between the joint and separate estates regard being had to the work done for and the benefit received by each estate. (p. 327, *ante*). **SECS. 44-48.**

**45.** In the calculation and distribution of a dividend the trustee shall make provision for debts provable in the insolvency appearing from the insolvent's statements or otherwise to be due to persons resident in places so distant from the place where the trustee is acting that in the ordinary course of communication they have not had sufficient time to tender their proofs or to establish them if disputed, and also for debts provable in the insolvency the subject of claims not yet determined. He shall also make provision for any disputed proofs or claims and for the expenses necessary for the administration of the estate or otherwise and subject to the foregoing provisions he shall distribute as dividend all money in hand. (p. 322, *ante*).

Provision for creditors residing at a distance.  
See E. (1883) s. 60.

**46.** Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any money for the time being in the hands of the trustee any dividend or dividends he may have failed to receive before that money is applied to the payment of any future dividend or dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein. (p. 322, *ante*).

Right of creditor who has not proved debt before declaration of dividend.  
See E. (1883) s. 61.

**47.** When the trustee has realized all the property of the insolvent or so much thereof as can in the joint opinion of himself and of the committee of inspection (if any) be realized without needlessly protracting the trusteeship he shall declare a final dividend, but before doing so he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified to him but not established to his satisfaction that if they do not establish their claims to the satisfaction of the court within a time limited by the notice he will proceed to pay a final dividend without regard to their claims. After the expiration of the time so limited or if the court on application by any such claimant grant him further time for establishing his claim then on the expiration of such further time the property of the insolvent shall be divided among the creditors who have proved their debts without regard to the claims of any other persons. (p. 321, *ante*).

Final dividend.  
See E. (1883) s. 62.

**48.** No action for any dividend shall lie against a trustee but if the trustee neglects or refuses to pay any dividend the court may if it thinks fit order him to pay it and also to pay out of his own money

No action for dividend.  
See E. (1883) s. 63.

**SECS. 48-52.** interest thereon for the time that it is withheld at such rate as the court may fix and the costs of the application. (pp. 25, 323, *ante*).

Right of insolvent to surplus.  
See E. (1888) s. 65.

**49.** The insolvent shall be entitled to any surplus remaining after payment in full of his creditors and the costs charges and expenses of the proceedings in the insolvency. (p. 344, *ante*).

Limitation of claim by trustee in insolvent estate.

**50.** No claim shall be made after the expiration of twenty years from the date of the sequestration of the estate by the assignee or trustee of any insolvent estate to any estate or interest in any land belonging to any insolvent. (pp. 201, 345, *ante*).

Dealings with estate.

**51.** Neither the trustee nor any member of a committee of inspection of an estate shall while acting as trustee or member of such committee without the express sanction of the court or of three-fourths in number and value of the creditors either directly or indirectly by himself or his wife or his employer or any partner clerk agent or servant become purchaser of any part of the estate or derive any profit or advantage from any transaction arising out of any insolvency in which he is trustee or member of committee. Any such purchase or transaction made contrary to the provisions of this section may be set aside or otherwise dealt with as may be deemed just by the court on the application by any person interested or without any application. (pp. 60, 188, 199, *ante*).

Trustee or member of committee not to purchase from himself or his partner or employer &c. without sanction.

**52. (1)** Neither the trustee nor any member of the committee of inspection shall without either the express sanction of the court or a resolution of three-fourths in number and value of the creditors present at a meeting specially convened for the purpose purchase or sell or cause to be purchased or sold for or on account of the estate any property from or to—

- (a) the trustee ; or
- (b) any member of the committee of inspection (including the said first-mentioned member of such committee); or
- (c) the wife of any partner employer clerk agent or servant of the trustee or of a member of the committee of inspection ; or
- (d) any person whomsoever whose connexion with the trustee or any member of the committee is of such nature as would result in the trustee or such member of the committee of inspection obtaining directly or indirectly any portion of the profit (if any) arising out of the transaction.

(2) In case of any purchase or sale made contrary to the provisions SECS. 52-54. of this section the court may on the application of any person interested or without any application make against the trustee or any member of the committee of inspection contravening the said provisions any order it may think just. (pp. 60, 188, 199, *ante*).

(c) *Accounts.*

53. (1) The creditors by ordinary resolution may direct that the assignee or trustee of any estate shall keep an account in the name of Power for creditors to select a bank for estate. such estate in such bank as is named in such resolution, and may authorize the said assignee or trustee to pay into such bank to the credit of such account all moneys received by him in such estate and out of such account to pay by cheque all payments to be made by him on account of such estate, and any interest receivable in respect of the said bank account shall be part of the assets of the estate. (pp. 158, 334, *ante*).

(2) If any assignee or trustee at any time retains for more than ten days in his own hands and without paying the same into the said bank account any money belonging to the estate, then unless he explains the retention to the satisfaction of the court he shall pay interest on the amount so retained at the rate of Twenty pounds per centum per annum and shall have no claim for remuneration and shall be removed from his office and shall be liable to pay any expenses occasioned by his default. (pp. 24, 335, *ante*).

(3) Until a resolution as aforesaid with regard to the moneys received in such estate is passed by the creditors, the assignee or trustee shall comply with the provisions of the next following section. (p. 335, *ante*).

54. (1) An account called "The Insolvency Estates Account Insolvency Estates Account. See E. (1883) s. 74. District" with the name of the district in which the account is opened prefixed to the word "District" shall be kept by the Chief Clerk with such bank or banks as the Treasurer of Victoria may from time to time direct. (p. 335, *ante*).

(2) Every assignee and every trustee shall in such manner and at Payments into the account. See E. (1883) s. 74 (2). such times as may be prescribed and at least once in every week pay into a bank in which such account is kept as aforesaid and to the credit of such account all moneys received by him as assignee or trustee, and shall forthwith deliver to the Chief Clerk the voucher of the bank for the moneys so paid in, together with a detailed statement of the amount

**SECS. 57-61.** trustee into the Insolvency Estates Account in accordance with the provisions of the Insolvency Acts, and the costs of any such account and the audit and the enforcement thereof shall be in the discretion of the court. (p. 325, *ante*).

**Saving of rights.** (2) The provisions of this section shall not deprive any person of any larger or any other right or remedy to which he may be entitled against such assignee or trustee. (p. 325, *ante*).

**Books to be submitted to committee of inspection.** **58.** The trustee shall submit his books and vouchers to the committee of inspection (if any) when required and not less than once every three months. (p. 333, *ante*).

**Delivery of books &c. on release of trustee.** **59.** The release of a trustee shall not take effect unless and until he has delivered over to the Chief Clerk all the books documents papers and accounts which by the Insolvency Acts or rules or any order of the court he is required to deliver over on his release. (p. 176, *ante*).

**Unclaimed dividends to be paid into Unclaimed Dividend Fund.** **60.** (1) All dividends in insolvent estates in the hands of any assignee or trustee at the commencement of this Act and which have not been claimed by the parties entitled thereto for the space of six months next after the same have been or shall be payable shall unless the court shall otherwise order be paid into the Insolvency Unclaimed Dividend Fund to be dealt with as to principal and interest as provided in section one hundred and twenty-seven of the Principal Act. (pp. 193, 324, *ante*).

(2) All dividends in estates administered or partly administered under the provisions of the Insolvency Acts which shall be unclaimed by the parties entitled thereto for the space of six months next after the same shall be payable shall unless the court shall otherwise order be paid into Her Majesty's Treasury to the credit of the said fund to be dealt with as to principal and interest as in the aforesaid section provided. (pp. 193, 324, *ante*).

(3) In this section "insolvent estates" and "estates" shall include not only estates in insolvency but also estates in liquidation by arrangement under section one hundred and fifty-three of the Principal Act. (pp. 193, 324, *ante*).

**Assignee and trustee to file accounts.** **61.** Every assignee or trustee shall at such times as may be prescribed but at intervals not greater than three months during his tenure of office file in the court an account of his receipts and payments as such assignee or trustee and any accounts or statements which may be prescribed.

See E. (1883)  
s. 78.

**62.** (1) Where the trustee carries on the business of the insolvent SECS. 62-64.  
 he shall keep a distinct account of the business and shall incorporate Trustee carrying on business.  
 in the books kept by him and so as to be easily discernible the total  
 weekly amount of the receipts and payments on account of such busi-  
 ness account. (pp. 180, 333, *ante*).

(2) The business account shall from time to time and not less than  
 once in every month be verified by a statutory declaration of the trustee,  
 and the trustee shall thereupon submit such account to the committee  
 of inspection (if any) or such member thereof as may be appointed by  
 the committee for the purpose. (pp. 180, 198, 333, *ante*).

**63.** Any creditor who has proved his debt or the insolvent may apply Creditor may obtain copy of trustee's accounts.  
 to the trustee for a copy of the accounts (or any part thereof) relating  
 to the estate as shown by the books directed by the Insolvency Acts to  
 be kept by the trustee and any other books kept by him, and on paying  
 for the same at the rate of Threepence per folio he shall be entitled to  
 have such copy accordingly. (p. 338, *ante*).

### PART III.—COMMITTEE OF INSPECTION.

**64.** Section fifty-three of the Principal Act is hereby amended as Amendment of section 53 of No. 1102.  
 follows :—

(a) In sub-section (III.) omit the words “being creditors qualified to  
 vote at a general meeting of creditors as is in this Act mentioned or  
 authorized in the prescribed form by creditors so qualified to vote” and  
 insert “whether creditors or not,” and after the words “insolvent’s  
 property” at the end of the said sub-section insert “and such appoint-  
 ment shall be made by a majority in number and value of the creditors  
 assembled at the meeting.” (pp. 157, 195, *ante*).

(b) After sub-section (IV.) the following sub-sections are hereby  
 added, namely :—

(v.) No creditor who is appointed a member of the committee of  
 inspection shall be qualified to act or shall act until he has  
 proved his debt and the proof has been admitted. (p. 196,  
*ante*).

(vi.) The committee of inspection shall meet at such times as they See E. (1883) s. 22.  
 shall from time to time appoint and failing such appoint-  
 ment at least once a month, and the trustee or any member  
 of the committee may also call a meeting of the committee  
 as and when he thinks necessary. (p. 196, *ante*).

SECS. 64-66.

(VII.) The committee may act by a majority of the members present at the meeting, but shall not act unless a majority of the committee are present at the meeting. (p. 196, *ante*).

(VIII.) If a member of the committee compounds or arranges with his creditors or if his estate is sequestrated in insolvency or if he is absent from three consecutive meetings of the committee his office shall thereupon become vacant. (p. 197, *ante*).

Committee of inspection not to derive profit out of estate.

65. No member of a committee of inspection of an estate shall except under and with the express sanction of the court or by a resolution of three-fourths in number and value of the creditors present at a meeting specially convened for the purpose directly or indirectly by himself or his wife or any employer partner clerk agent or servant be entitled to derive any profit or advantage from any transaction arising out of any insolvency while he is member of such committee or to receive out of the estate any payment for services rendered in connexion with the administration of the estate other than such amount as may be voted by the meeting of creditors at the date of their appointment. If it appears that any profit or payment has been made contrary to the provisions of this section the court may disallow such payment or direct the person contravening the provisions hereof to pay into court such profit (as the case may be) on the audit of the trustee's account. (p. 198, *ante*).

## PART IV.—OFFICIAL ACCOUNTANT.

Official Accountant to be officer of court.

66. (1) There shall be an officer of the Court of Insolvency styled the Official Accountant. (pp. 189 to 195, *ante*).

Appointment.

(2) Such officer shall be appointed by the Governor in Council subject to the Public Service Acts, and subject to the said Acts the Governor in Council may remove or suspend him. Every person appointed to the office of Official Accountant shall be a person who is a member of the public service or a person who having been in the public service is in receipt of a superannuation or retiring allowance, unless the Public Service Board certifies in writing that there is no person already in the public service or receiving a superannuation or retiring allowance available and competent to fulfil the duties of such office.

(3) The said office may be held in conjunction with any other office in the public service.

(4) In this section the expression "public service" extends to and includes railway service and service in any office or employment whatever in Victoria for which payment is paid by the Crown out of any special appropriation of the consolidated revenue. **SECS. 66-71.**

See No. 1374  
s. 3.

(5) All courts and all persons judicially acting shall take judicial notice of the signature of the Official Accountant.

**67.** The Official Accountant shall take cognizance of all matters relating to the appointment security and conduct of assignees and trustees in relation to estates in insolvency liquidation by arrangement compositions or deeds of arrangement within the meaning of Part VI. of this Act, and shall immediately report in writing to the court whenever there shall appear to be any contravention of the provisions of the Insolvency Acts in relation thereto. (pp. 190, 449 *ante*).

Official  
Accountant to  
take cognizance  
of certain  
matters.

**68.** The Official Accountant shall attend the court whenever the court shall so direct, and shall at all times make such audits investigations and inquiries in regard to any proceedings under the Insolvency Acts and report thereon as the court shall direct, and shall generally in addition to the duties expressly imposed upon him by this Act perform all such duties as may be prescribed by rules or specially directed by the court. (p. 190, *ante*).

Official  
Accountant to  
attend court and  
make audits &c.  
as directed.

**69.** The court or the Official Accountant may at any time require the production of and inspect any books or accounts kept by the Chief Clerk, and the Official Accountant shall audit all books and accounts of the Chief Clerk once at least every six months and for the purpose of such audit the Chief Clerk shall furnish the Official Accountant with such vouchers and information as he shall require. (p. 190, *ante*).

Chief Clerk's  
books and  
accounts to be  
inspected and  
audited.

**70.** The Official Accountant shall examine all statements accounts vouchers and documents filed by the trustee and shall call the trustee to account for any misfeasance neglect or omission which may appear on or from such statements accounts or vouchers or documents or otherwise, and may in writing require the trustee to make good any loss the estate of the insolvent may have sustained by such misfeasance neglect or omission. If the trustee fail to comply with such requisition of the Official Accountant the Official Accountant may report the same in writing to the court, and the court after hearing the explanation if any of the trustee shall make such order in the premises as it thinks just. (pp. 25, 191, *ante*).

Trustee's filed  
accounts &c.  
to be examined  
&c.

**71. (1)** The Official Accountant may at any time require any trustee to answer any inquiry made by him in relation to any insolvency in

Official Accountant may make inquiries of

**SECS. 71-73.** which such trustee is engaged, and may if he think fit apply to the court to examine on oath such trustee or any other person concerning such insolvency. He may also investigate the books and vouchers of the trustee. (p. 191, *ante*).

trustee and  
investigate his  
books &c.

(2) In this and the last preceding section "trustee" shall also include assignee. (p. 191, *ante*).

Official Account-  
tant to take  
cognizance of  
statutory  
accounts.

**72.** The Official Accountant shall take cognizance of and examine the Insolvency Estates Account and every account which a trustee has at a bank in relation to an estate and the Unclaimed Dividend Account and the Insolvents Suitors' Fund and all books vouchers and documents relating thereto and shall immediately report to the court any contravention of the Insolvency Acts by any person in relation to any of the said accounts or funds. (p. 190, *ante*).

#### PART V.—COMPOSITIONS.

Special  
provisions.

**73.** Notwithstanding anything contained in the Principal Act the following provisions shall have effect as to proceedings as to compositions under section one hundred and fifty-four of the said Act (that is to say):—

Resolution not  
to be registered  
unless ordered  
by court.

(1) No extraordinary resolution by the creditors of a debtor that a composition shall be accepted in satisfaction of the debts due to them from the debtor shall be registered by the Chief Clerk until so ordered by the court. (p. 431, *ante*).

Time for  
presenting  
resolution.

(2) The chairman of the meeting at which the extraordinary resolution is agreed to or the debtor shall present or cause the same to be presented to the Chief Clerk as directed by the Principal Act within three days after the same is agreed to or within such further time not exceeding in the whole ten days from the date when the resolution was agreed to as the court may allow. Unless this sub-section is complied with the resolution shall not be registered. (p. 430, *ante*).

Appointment to  
consider  
composition.

(3) The debtor or any creditor may within fourteen days from the presentation of such resolution apply to the court to appoint a day to consider the composition which day shall not be earlier than fourteen days from such presentation, and notice of such appointment shall be given by advertisement and in such other manner as the court may direct. (p. 431, *ante*).



- (4) Any creditor may on filing in court three days at least before the day appointed a notice of his intention to oppose the composition be heard against the same, but the debtor and any creditor may without notice be heard in favour thereof. (p. 431, *ante*). SEC. 73.  
Opposition and support.
- (5) If the court shall be of opinion that the terms of a composition are not reasonable or are not calculated to benefit the general body of creditors, or if any such facts are proved as would under the Insolvency Acts require or justify the court in the case of insolvency in refusing or suspending a certificate or in punishing the insolvent the court shall refuse to approve the composition. In any other case the court may either approve or refuse to approve the composition. (pp. 431, 433, *ante*). Powers of court.  
See E. (1890) s. 3 (10).
- (6) If the court refuses to approve the composition the resolution shall not be registered and the composition proposed shall not have any force or effect. (p. 431, *ante*). Effect of refusal to approve.
- (7) If the court approves the composition the approval shall be testified by the terms being embodied in an order of the court. (p. 431, *ante*). Proceedings on approval.
- (8) The provisions of a composition may be enforced by the court on application by any person interested, and any disobedience of an order of the court shall be deemed a contempt of court. (p. 437, *ante*). Enforcement.  
See E. (1890) s. 3 (14).
- (9) If default be made in payment of any instalment due in pursuance of the composition or if it appears to the court that the composition cannot proceed without injustice or undue delay to the creditors or to the debtor or that the approval of the court was obtained by fraud the court may annul the composition but without prejudice to the validity of any sale disposition or payment duly made or thing duly done under or in pursuance of the same. (pp. 436, 437, *ante*). Power to annul.
- (10) Every person who would be entitled to prove in insolvency shall be deemed a creditor within the meaning of section one hundred and fifty-four of the Principal Act and of this section, and in case there shall be any dispute as to the right of any person to be deemed a creditor or as to the amount of his debt or the value of his security the court may settle such dispute. (p. 439, *ante*). Persons to be deemed creditors.

**SECS. 73, 74.****Examinations.**

- (11) After the presentation to the Chief Clerk of any extraordinary resolution the court shall have the same powers authority and jurisdiction to examine or direct the examination of any person whomsoever as it has in case of insolvency. (pp. 369, 437, *ante*).

**General provisions of Insolvency Acts applied.**

- (12) All the provisions of the Insolvency Acts with regard to the administration and distribution of the debtor's property and the duties obligations powers and rights of the trustee shall so far as the nature of the case and the terms of the composition admit apply to compositions as in case of insolvency and as if the trustee were the trustee in insolvency. (pp. 413, 437, *ante*).

**Priorities to be provided for.**

- (13) No composition shall be approved by the court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of an insolvent. (p. 433, *ante*).

**Certain rights not to be prejudiced.**

- (14) The acceptance by a creditor of a composition shall not release any person who under the Insolvency Acts would not be released by a certificate of discharge if the estate of the debtor had been sequestrated in insolvency. (p. 437, *ante*).

**Proceedings to be public.**

- (15) Every resolution and statement presented to the Chief Clerk shall be open for public inspection on payment of the prescribed fee, and all applications to the court and the hearing thereof shall be in open court. (pp. 420, 438, *ante*).

**PART VI.—DEEDS OF ARRANGEMENT.***Subdivision 1.***Application of Part.  
See E. (1887)  
s. 4.**

**74.** (1) This Part shall apply to every deed of arrangement as defined in this section made after the commencement of this Act.

(2) A deed of arrangement to which this Part applies shall include any of the following instruments whether under seal or not made by for or in respect of the affairs of a debtor for the benefit of his creditors generally (that is to say):—(p. 440, *ante*).

(a) An assignment of property : (p. 441, *ante*).

(b) A deed of agreement for a composition : (p. 442, *ante*).

and in cases where creditors of a debtor obtain any control over his property or business—

- (c) A deed of inspectorship entered into for the purpose of carrying on or winding up a business : (p. 443, *ante*). SECS. 74-76.
- (d) A letter of licence authorizing a debtor or any other person to manage carry on realize or dispose of the business with a view to the payment of debts : and (p. 443, *ante*).
- (e) Any agreement or instrument entered into for the purpose of carrying on or winding up of a debtor's business or authorizing a debtor or any other person to manage carry on realize or dispose of a debtor's business with a view to the payment of his debts. (p. 443, *ante*).

Provided that nothing in this Part shall apply to any agreement for composition within section one hundred and thirty-one of the Principal Act or to any liquidation by arrangement or any composition under sections one hundred and fifty-three and one hundred and fifty-four respectively of the said Act. (p. 441, *ante*).

**75.** From and after the commencement of this Act a deed of arrangement to which this Part applies shall be inoperative and shall not have any validity at law or in equity unless the same shall have been registered under this Act within ten clear days after the first execution thereof by the debtor or any creditor or if it is executed in any place out of Victoria then within ten clear days after the time at which it would in the ordinary course of post arrive in Victoria if posted within one week after the execution thereof. (p. 443, *ante*).

Avoidance of  
unregistered  
deeds of  
arrangement.  
See E. (1887)  
s. 5.

**76.** The registration of a deed of arrangement under this Act shall be effected in the following manner :—

Mode of  
registration.  
See E. (1887)  
s. 6.

The deed and every schedule or inventory thereto annexed or therein referred to or a true copy thereof respectively and of every attestation of the execution thereof shall be filed in the office of the Registrar-General within the time aforesaid together with an affidavit verifying the time of execution by the debtor and containing a description of the residence and occupation of the debtor and of the place or places where his business is carried on and the title of the firm or firms under which the debtor carries on business and an affidavit by the debtor stating the total estimated amount of property and liabilities included in the deed the total amount of the composition (if any) payable thereunder the name occupation and address of the trustee (if any) and the names and addresses of his creditors. A deed of arrangement regis-

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tered as required by the provisions of this and the preceding section shall be deemed to be registered or filed in accordance with the provisions of Part VI. of the *Instruments Act* 1890 and of the *Book Debts Act* 1896. (pp. 109, 444, *ante*).

Form of  
register.  
See E. (1887)  
s. 7.

77. The Registrar-General shall keep a register wherein shall be entered as soon as conveniently may be after the presentation of a deed for registration an abstract of the contents of every deed of arrangement registered under this Act containing the following and any other prescribed particulars :—

- (a) The date of the deed.
- (b) The name address and description of the debtor and the place or places where his business is carried on and the title of the firm or firms under which the debtor carries on business and the name and address of the trustee (if any) under the deed.
- (c) A short statement of the nature and effect of the deed and of the composition in the pound payable thereunder.
- (d) The date of registration.
- (e) The amount of property and liabilities included under the deed as estimated by the debtor. (p. 446, *ante*).

Trustee not to  
encumber &c.  
property until  
certain time.

78. (1) The trustee of a deed of arrangement shall not except in the ordinary course of the business (if any) theretofore carried on by the debtor, sell, pledge, or in any way dispose of or encumber any of the property included in or under the deed until after ten days from the registration thereof as required by this Act. (p. 449, *ante*).

(2) A trustee wilfully contravening the provisions of the last preceding sub-section and every person wilfully party to such contravention shall be personally liable to make good to the estate any loss occasioned by such contravention. (p. 449, *ante*).

(3) The provisions of this section shall not apply to any case where the court upon application in that behalf is satisfied that it is expedient before the expiration of the said period of ten days from registration to effect any sale pledge disposition or incumbrance and directs that the trustee be at liberty to effect the same. (p. 449, *ante*).

(4) Nothing in this section contained shall in any way prejudice or affect any person dealing in good faith with the trustee. (p. 449, *ante*).

Provisions of  
Insolvency Acts  
how far  
applicable.

79. The provisions of the Insolvency Acts as to the payment of certain claims as preferential and as to the proof of debts and as to the

respective rights of secured and unsecured creditors and as to the examination of the debtor or any other person shall apply to every deed of arrangement registered as aforesaid. (pp. 369, 440, *ante*). SECS. 79-83.

**80.** No deed of arrangement shall be deemed insufficient or invalid by reason only that in such deed or any schedule or inventory or copy thereof respectively or any affidavit there is an omission or incorrect or insufficient description or misdescription in respect of any of the particulars required by law to be contained therein if the court judge or justice before whom the validity of such deed comes into question shall be satisfied that such omission or incorrect or insufficient description or misdescription was accidental or due to inadvertence or to some cause beyond the control of the debtor and not imputable to any negligence on his part. (p. 445, *ante*). Immaterial error not to invalidate.  
See E. (1887) s. 9.  
See No. 1424 s. 13.

#### *Subdivision 2.*

**81.** Nothing contained in this Part shall be construed to repeal or shall affect any provision of the law for the time being in force with regard to deeds of arrangement in relation to insolvency or shall give validity to any deed or instrument which by law is an act of insolvency or void or voidable. (p. 441, *ante*). Saving as to insolvency law.  
See E. (1887) s. 17.

**82.** In this Part unless the context otherwise requires—

“Creditors generally” includes all creditors who may assent to or take the benefit of a deed of arrangement and whether or not the deed provides that any of such creditors shall have any preference or priority as regards any other creditors, and whether or not the trustee (if any) of the deed or any other person shall have any discretion as to giving any creditor a preference or priority or any advantage as regards any other creditor. (p. 441, *ante*). Interpretation.  
See E. (1887) s. 19.

“Prescribed” means “prescribed by rules to be made under this Part of this Act.”

“Priority” has the same meaning as the same expression has in the Principal Act. (p. 441, *ante*).

“Rules” includes forms.

**83.** (1) The trustee of a deed of arrangement shall be deemed to be an officer of the Court of Insolvency and no person shall be appointed or act as such trustee unless he is registered as qualified to be appointed to the office of trustee under the Insolvency Acts, or if not so registered unless he is one of the creditors or a person appointed by an ordinary Trustee of deed of arrangement to be officer of court.

**SECS. 83-87.** resolution of the creditors, and before he acts under the deed he shall give security in manner in Part II. of this Act provided with regard to a trustee in insolvency, and so far as the nature of the case will admit the trustee creditors and debtor respectively shall have the same functions powers rights duties obligations and liabilities and the court shall have the same powers authority and jurisdiction as in the case of insolvency. (p. 448, *ante*).

(2) In this Part "trustee" shall also include every person having under a deed of arrangement the power right or duty to pay dividends to the persons entitled thereto, and "dividend" shall also include all moneys which under the deed of arrangement are payable by the trustee to the persons entitled thereto. (p. 449, *ante*).

(3) Where a person not registered as aforesaid is appointed a trustee pursuant to this section he shall not act as trustee until a copy of such resolution has been filed by the Chief Clerk and such person has given security as aforesaid. (p. 449, *ante*).

Debtor to  
furnish  
statement when  
required.

**84.** At any time within three years after a debtor has made a deed of arrangement the court may require such debtor to make a statement verified by affidavit giving particulars of all his assets and liabilities and property whatsoever, and if he without reasonable cause fails to do so he shall be guilty of a contempt of court. (p. 450, *ante*).

Unclaimed  
dividends in  
respect of past  
deeds of arrange-  
ment to be paid  
into Unclaimed  
Dividend Fund.

**85.** (1) In the case of any deed of arrangement made before the commencement of this Act all dividends now in the hands of the trustee of the deed which have not been claimed by the parties entitled thereto for the space of twelve months next after the same have been or shall be payable shall unless the court otherwise orders be paid by the trustee into the Insolvency Unclaimed Dividend Fund to be dealt with as to principal and interest as provided in section one hundred and twenty-seven of the Principal Act. (p. 450, *ante*).

(2) "Deed of arrangement" in this section shall include any deed instrument or writing which if made after the commencement of this Act would be deemed to be a deed of arrangement within the meaning of this Part. (p. 450, *ante*).

Time for  
registration.  
See E. (1887) s.  
10.

**86.** When the time for registering a deed of arrangement expires on a Sunday or other day on which the office of the Registrar-General is closed the registration shall be valid if made on the next following day on which the office is open. (p. 444, *ante*).

Office copies.  
See E. (1887) s.  
11.

**87.** Subject to the provisions of this Act any person shall be entitled to have an office copy of or extract from any deed registered under this

Act upon paying for the same at the rate mentioned in the Second Schedule to this Act and any copy or extract purporting to be an office copy or extract shall in all courts and before all judges justices arbitrators or other persons be admitted as *prima facie* evidence thereof and of the effect and date of registration of the deed as shown thereon. (p. 446, *ante*).

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Second  
Schedule.

88. (1) Any person shall be entitled at all reasonable times to search the register upon paying the fee specified in the Second Schedule to this Act, and shall be entitled at all reasonable times to inspect and examine and make extracts from any registered deed of arrangement without being required to make a written application or to specify any particulars in reference thereto upon payment of the said fee for each deed of arrangement inspected.

Inspection of  
register and  
registered deeds.  
See E. (1887) s.  
12 (1).  
Second  
Schedule.

(2) The said extracts shall be limited to the dates of execution and of registration the names addresses and descriptions of the debtor and of the parties to the deed a short statement of the nature and effect of the deed and any other prescribed particulars. (p. 446, *ante*).

89. (1) When the place of business or residence of the debtor who is one of the parties to the deed of arrangement or who is referred to therein is situate in some place more than twenty miles from the General Post Office, Melbourne, the Registrar-General shall after three clear days after registration and in accordance with any directions that may be prescribed transmit a copy of such deed to the Registrar of the County Court in or near the place where such place of business or residence is situate. (p. 447, *ante*).

Local registra-  
tion of copy of  
deeds.  
See E. (1887) s.  
13.

(2) Every copy so transmitted shall be filed kept and indexed by the Registrar of the County Court in the prescribed manner, and any person may search inspect make extracts from and obtain copies of the registered copy in the like manner and upon the like terms as to payment or otherwise as near as may be as in the case of deeds registered under this Act. (p. 447, *ante*).

(3) The Registrar-General shall forthwith notify the Chief Clerk in Melbourne of the registration of every deed of arrangement. (p. 447, *ante*).

90. (1) There shall be taken in respect of the registration of deeds of arrangement and in respect of any office copies or extracts or searches made by or at the office of the Registrar-General the fees set forth in the Second Schedule to this Act, and nothing in this Act contained shall make it obligatory on the Registrar-General to do or permit to be

Fees.  
See E. (1887)  
s. 15 (1).  
Second  
Schedule.

**SECS. 90-92.** done any act in respect of which any fee is specified except on payment of such fee. (p. 448, *ante*).

Rules.  
See E. (1887)  
s. 15 (2).

(2) It shall and may be lawful for the Judges of the Supreme Court or any two of them of whom the Chief Justice shall be one to make such rules as they may think fit for regulating proceedings under this Part of this Act. (p. 448, *ante*).

#### PART VII.—CERTIFICATE OF DISCHARGE.

On certificate  
application  
trustee may be  
examined by  
court.  
See E. (1890) s. 8.

**91.** (1) On any voluntary or compulsory application for a certificate of discharge or on any compulsory appearance by an insolvent before the court under the provisions of section one hundred and forty-nine of the Principal Act the court may examine or permit any creditor or the insolvent to examine the trustee on oath as to the insolvent's conduct and affairs. (p. 375, 384, 386, *ante*).

Opposition.

(2) The trustee or any creditor who has proved his claim may without notice to the insolvent oppose the insolvent's application for a certificate of discharge and may examine him on oath as to any matter or thing relating to his estate and as to his transactions and conduct and as to the causes of his inability to pay his debts. (pp. 376, 379, 381, 384, *ante*).

Adjournment.

(3) The court may adjourn the hearing of any such application as it shall think fit and may require the trustee or any opposing creditor to furnish the insolvent before the time appointed for the adjourned hearing with written notice of the grounds of his opposition. (pp. 380, 383, 386, *ante*).

Trustee's report.

(4) Prior to the day appointed for the hearing of an application for a certificate, if he has not already done so, the trustee shall file in the court a full report concerning the estate and the conduct of the insolvent and of all other matters with which it may be desirable that the court should be acquainted. (p. 375, *ante*).

Powers of court.  
See E. (1890)  
s. 8.

**92.** The court shall take into consideration the report of the trustee and any report of the Official Accountant, and may as it thinks just—

- (a) grant or refuse an immediate absolute certificate of discharge;  
or
- (b) suspend the certificate from taking effect for such time as the court may think fit not exceeding two years; or
- (c) suspend the certificate until such dividend as the court may fix but not exceeding Seven shillings in the pound has been paid



to the creditors ; or until security for the payment of such dividend has been given to the satisfaction of the court. If the sureties for such security have to pay the amount of dividend or any part thereof, and the debtor again becomes insolvent, then the sureties shall not be entitled to any dividend until the debts incurred by the insolvent since he obtained his certificate shall have been paid. **SECS. 92-96.**

Provided that the court shall refuse to grant the certificate in all cases where the insolvent has been guilty of any offence under the Insolvency Acts unless for special reasons the court otherwise determines. (pp. 385, 387, *ante*).

**93.** No insolvent unless the court otherwise directs shall be entitled to an absolute grant of a certificate of discharge until all persons mentioned in sub-section two of section one hundred and fifteen of the Principal Act having claims against his estate have either consented to such grant or have been paid and satisfied such portion of the amounts owing to them as is by the said sub-section made a preferential claim against the estate. (p. 386, *ante*). Preferential claims to be paid or satisfied or consent to be given.

**94.** Any insolvent may apply for a certificate of discharge from time to time unless the court shall on any application fix the period within which he shall not be entitled to make such application. (p. 379, *ante*). Repeated application for certificate.

**95.** In case of failure to comply with the whole or any of the conditions fixed by a conditional grant of certificate the court may at any time grant an absolute certificate of discharge to the insolvent on his application if the court shall be satisfied that the failure to comply with such conditions has arisen from circumstances for which the insolvent cannot justly be held responsible. (p. 385, *ante*). Absolute discharge notwithstanding non-compliance with conditions.

**96.** A certificate of discharge shall not release an insolvent from any— Effect of certificate. See E. (1883) s. 30.

- (a) Debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party ; (pp. 280, 400, *ante*).
- (b) Debt or liability whereof he has obtained forbearance by any fraud to which he was a party ; or (p. 280, *ante*).
- (c) Liability under a judgment against him under an action for seduction or under an affiliation or maintenance order or under an order or a judgment against him as a respondent or co-respondent in a matrimonial cause except to such extent and under such conditions as the court expressly orders in respect of such liability. (pp. 280, 389, 400, *ante*). See E. (1890) s. 10.

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Certificate not to  
release partner  
or trustee or  
co-contractor  
&c.

See E. (1893) s.  
30 (4).

Notwithstand-  
ing discharge  
insolvent to  
assist trustee &c.

Accounts of  
after-acquired  
property.

**97.** A certificate of discharge shall not release any person who at the date of sequestration was a partner or co-trustee with the insolvent or was jointly bound or had made any joint contract with him or any person who was surety or in the nature of a surety for him. (p. 399, *ante*).

**98.** An insolvent who has obtained a certificate of discharge shall notwithstanding his discharge give such assistance as the trustee or the court may require in the realization and distribution of such of his property as is vested in the trustee upon payment of reasonable expenses, and if he without reasonable cause fails to do so he shall be guilty of a contempt of court. (p. 341, *ante*).

**99.** Where an insolvent has not obtained a certificate of discharge or where he has obtained a certificate of discharge subject to any condition as to his future earnings or after-acquired property or subject to the suspension of such certificate either for a specified time or until such dividend as the court may fix has been paid to the creditors it shall be his duty until he obtains a certificate of discharge or until such condition is satisfied or until the period of suspension has expired or until such dividend is paid (as the case may be) from time to time to give the Official Accountant or the court such information as the Official Accountant or the court may require with respect to his earnings and after-acquired property and income or rights to property or income. (pp. 195, 342, *ante*).

### PART VIII.—SETTLEMENTS.

Settlements on  
wife or children  
to be invalid  
unless  
registered.

Time of  
registration.

**100.** (1) Every settlement of property on or for the wife or children or both wife and children of the settlor made after the commencement of this Act not being a settlement made before or in consideration of marriage or a settlement made on or for the wife or children or both wife and children of the settlor of property which has accrued to the settlor after marriage in right of his wife shall in case of the insolvency of the settlor at any time thereafter, be absolutely void and of no effect against the assignee or trustee in insolvency unless such settlement be in writing and—(p. 230, *ante*).

(a) If made within twelve months before the insolvency of the settlor and executed within Victoria shall have been registered within seven clear days after the execution thereof by the settlor; or

(b) If made within twelve months before the insolvency of the settlor and executed in any place out of Victoria shall have been registered within twenty-one clear days after the time at

which it would in the ordinary course of post arrive in Victoria if posted within one week after the execution thereof by the settlor ; or

- (c) If made more than twelve months before the insolvency of the settlor, then wherever executed shall have been registered at least twelve months before such insolvency.

(2) "Settlement" shall for the purposes of this Part include any conveyance or transfer of property. (p. 230, *ante*).

**101.** The registration of a settlement under this Part shall be effected in the following manner :—

Mode of registration.

- (1) The settlement and every schedule and inventory thereto annexed or therein referred to or a memorial thereof setting forth the date of the settlement the name address and description of the parties to the settlement and of the persons intended to be benefited thereby and the place or places where the settlor resides or carries on his business and the title of the firm or firms under which he carries on business and the name and address of the trustee (if any) under the settlement ; and
- (2) a description and estimated value of the property settled ; and
- (3) an affidavit verifying the several matters and things in this section particularized as required to be set forth in a memorial and also verifying the description and estimated value of the property settled

shall be filed in the office of the Registrar-General within the time aforesaid. (p. 230, *ante*).

**102.** No settlement shall be deemed invalid by reason only that in any memorial thereof filed with the Registrar-General there is an omission or incorrect or insufficient description or misdescription in respect of any of the particulars required by law to be contained therein if the court judge or justice before whom the validity of such settlement comes into question shall be satisfied that such omission or incorrect or insufficient description or misdescription was accidental or due to inadvertence or to some cause beyond the control of the settlor and not imputable to any negligence on his part and in any case was not of such a nature as to be liable to mislead. (p. 230, *ante*).

Accidental error not to invalidate settlement.

**103.** In either of the following cases (that is to say) :—

- (a) In case of a settlement made before or in consideration of marriage where a settlor is not at the time of making the settle-

Fraudulent settlements.

See E. (1888) s. 29.

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ment able to pay all his debts without the aid of the property comprised in the settlement ; or (p. 231, *ante*).

- (b) In case of any covenant or contract made in consideration of marriage for the future settlement on or for a settlor's wife or children or both wife and children of any money or property wherein he had not at the date of his marriage any estate or interest (not being money or property of or in right of his wife) ; (p. 231, *ante*).

if the estate of the settlor is sequestrated or he compounds or arranges with his creditors and it appears to the court that such settlement covenant or contract was made in order to defeat or delay creditors or was unjustifiable having regard to the state of the settlor's affairs at the time when it was made the court may refuse or suspend a certificate of discharge or grant an order subject to conditions or refuse to approve the composition or arrangement as the case may be in like manner as in cases where a debtor has been guilty of fraud. (p. 387, *ante*).

Fraudulent settlements before absolute certificate void against trustee.

**104.** Any settlement which would if made within two years before the insolvency be void as against the assignee or trustee of the insolvent estate and any covenant or contract which would if made before the insolvency be void as against such assignee or trustee shall if made by an insolvent after the date of the sequestration and before obtaining an absolute certificate of discharge be void as against the assignee or trustee of his estate. (p. 231, *ante*).

Application of subdivision 2 of Part VI.

**105.** (1) The provisions of subdivision 2 of Part VI. of this Act shall apply *mutatis mutandis* to settlements under this Part.

Saving of general law.

(2) Nothing contained in this Part (except so far as is expressly provided) shall be construed to repeal or shall affect any provision of the law for the time being in force in relation to settlements or shall give validity to any settlement which by law is void or voidable. (p. 231, *ante*).

## PART IX.—PETITIONS.

Definition of "creditors generally" in s. 37 (1) of No. 1102.

**106.** (1) In sub-section (1.) of section thirty-seven of the Principal Act the expression "creditors generally" shall include all creditors who may assent to the conveyance or assignment mentioned in such sub-section and whether or not such conveyance or assignment provides that any of the creditors shall have any preference or priority as regards any other creditors and whether or not the trustee (if any) thereof or any other person shall have any discretion as to giving any creditor a

preference or priority or any advantage as regards any other creditor. SECS. 106-11.  
(p. 106, *ante*).

(2) In the said section thirty-seven of the Principal Act after the words "liquidated sum due at law or in equity" the words "payable either immediately or at some certain future time" shall be inserted. (p. 96, *ante*).

Liquidated sum due but not payable to be good petitioning debt. See E. (1883) s. 6.

107. Where a petition in insolvency is presented if the petitioner does not proceed with due diligence the Supreme Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by the Insolvency Acts in the case of the petitioning creditor. (pp. 84, 151, *ante*).

Power to change carriage of proceedings. See E. (1883) s. 107.

108. (1) If a debtor by or against whom an insolvency petition has been presented dies the proceedings in the matter shall unless the court otherwise orders be continued as if he were alive. (pp. 73, 151, 353, *ante*).

Continuance of proceedings on death of debtor. See E. (1883) s. 108.

(2) The Supreme Court may at any time for sufficient reason make an order staying the proceedings under an insolvency petition either altogether or for a limited time on such terms and subject to such conditions as to such court may seem just. (pp. 73, 151, *ante*).

Power to stay proceedings. See E. (1883) s. 109.

109. Any creditor whose debt is sufficient to entitle him to present an insolvency petition against all the partners of a firm may present a petition against any one or more partners of the firm without including the others. (pp. 86, 91, 96, *ante*).

Power to present petition against one partner. See E. (1883) s. 110.

110. Where there are more respondents than one to an order *nisi* the Supreme Court may discharge such order *nisi* as to one or more of them without prejudice to the effect of the petition as to the other or others of them. (pp. 91, 144, *ante*).

Power to discharge order *nisi* against some respondents only. See E. (1883) s. 111.

#### PART X.—EXAMINATIONS.

111. Every examination under sections one hundred and thirty-four and one hundred and thirty-five respectively of the principal Act shall be subject to the following provisions:—

Examination under sections 134 and 135 of No. 1102. See E. (1883) ss. 17 and 27.

- (1) If the court either upon application or without any application shall direct the trustee or if one-fourth of the creditors in number or value who have proved shall in writing at any time before the granting of an absolute certificate of discharge request the trustee to cause an examination sitting of the court to be held or to summon before the court any person liable to be summoned under either of the sections

If court or creditor so require trustee to obtain examination.

**SECS. 111-12.**

hereinbefore mentioned the trustee shall comply with such direction or request.

Notice of  
examination.

- (2) At least seven days' notice of the intention to hold an examination shall be advertised in a local newspaper by the trustee and shall be sent to the creditors. (p. 358, *ante*).

Examination of  
insolvent.

- (3) The trustee and any creditor who has proved his claim may without any notice to the insolvent examine the insolvent. (pp. 356, 357, 361, *ante*).

Power of court  
to order  
payment of  
admitted debt

- (4) If any person on examination before the court admits that he is indebted to the insolvent, the court during or at the close of the examination or at any time thereafter may on the application of the trustee or any person interested, order him to pay to the trustee at such time and in such manner as to the court seems expedient the amount admitted or any part thereof either in full discharge of the whole amount in question or not as the court thinks fit, and with or without costs of the examination and order. (pp. 49, 60, 200, *ante*).

Power of court  
to order  
delivery of  
property  
admittedly  
belonging to  
insolvent.

- (5) If any person on examination before the court admits that he has in his possession or under his control any property belonging to the insolvent, the court during or at the close of the examination or at any time thereafter may on the like application order him to deliver to the trustee such property or any part thereof at such time and in such manner and on such terms as to the court may seem just, and with or without costs of the examination and order. (pp. 12, 13, 49, 60, 200, *ante*).

Costs of  
examination.

- (6) Except where the trustee has been directed by the court or requested by at least one-fourth in number or value of the creditors who have proved to cause any examination to be held, the court may at its discretion order that the trustee be not allowed the costs or any part of the costs of such examination or may order the trustee to pay such costs or any part thereof. (p. 60, *ante*).

Examinations  
may be held by  
a police  
magistrate.

**112.** (1) Any police magistrate at the city town or place where the proceedings in any estate are conducted if he is satisfied on the written application of the assignee or trustee that it is necessary or expedient in order to prevent unnecessary expense or delay or for any other reasonable cause so to do shall have and exercise all the powers which the

court had under sections one hundred and thirty-four one hundred and **SECS. 112-13.**  
 thirty-five one hundred and thirty-six and one hundred and thirty-seven  
 of the Principal Act before the commencement of this Act. (pp. 199,  
 368, *ante*).

(2) The advertisement and other notification of and the mode of conducting any examination before a police magistrate under the provisions of this section shall be as nearly as practicable the same as if such examination took place before the court. (pp. 199, 368, *ante*).

(3) Any order made by a police magistrate under the powers conferred by this section shall be subject to appeal therefrom as if such order were made by the court, and all the provisions of the Insolvency Acts relative to appeal are hereby made applicable thereto. (pp. 19, 200, 368, *ante*).

(4) The police magistrate shall sign all evidence given before him and forthwith transmit the same together with any documents or other exhibits produced in evidence before him to the court. (pp. 199, 368, *ante*).

(5) The court shall in relation to such examination have all the powers authority and jurisdiction as to ordering payment of any debt or the delivery of any property as to costs and otherwise which it would have had if such examination were had before the court. (p. 200, *ante*).

#### PART XI.—DECEASED PERSONS' ESTATES.

**113.** (1) Any creditor or creditors of the estate of any deceased person whose debt or debts would have been sufficient to support a petition for sequestration against such deceased person had he been alive may in manner provided by the Insolvency Acts petition to have the estate of such deceased person placed under sequestration as insolvent. (pp. 94, 312, *ante*).

Sequestration of  
 estate of  
 deceased person.  
 See E. (1883)  
 s. 125.

(2) Upon such petition and upon proof that the estate is insufficient to pay its debts or that the creditors of such estate may be defeated hindered or delayed in obtaining payment of the debts due by such estate unless such estate is sequestrated, an order for sequestration thereof may be made, and thereupon the like proceedings shall and may be had and take place concerning such estate and its representatives as are provided to be had and take place concerning other estates and other insolvents. (p. 94, *ante*).

See V. s. 42.

**SECS. 113-17.** (3) Any claim by the representative of the deceased person to payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate shall be deemed a preferential debt and shall be payable in full out of the estate in priority to all other debts. (pp. 94, 286, 317, *ante*).

(4) If any surplus remains in the hands of the trustee in insolvency after payment in full of all debts due by such estate together with the costs of the administration and interest as provided by the Insolvency Acts such surplus shall be paid over to the representatives of the estate or dealt with in such other manner as may be prescribed or as the court may direct. (pp. 95, 344, *ante*).

#### PART XII.—SUPPLEMENTAL.

Chief Clerk to  
peruse evidence  
and report  
offences.

**114.** It shall be the duty of the Chief Clerk to peruse all evidence taken upon examinations under Part VII. of the Principal Act and to report to the Attorney-General at least once in every month whether such evidence in any case shows or tends to show that an offence against the insolvency law has been committed by any person. (p. 360, *ante*).

Application of  
Acts to all  
trustees.

**115.** The provisions of the Insolvency Acts with respect to the duties liabilities and responsibilities of and accounting by a trustee in an insolvency shall apply as nearly as may be to a trustee in liquidation by arrangement or composition under sections one hundred and fifty-three and one hundred and fifty-four respectively of the Principal Act or under a deed of arrangement under this Act. (p. 422, *ante*).

Amendment of  
section 73 of No.  
1102.

**116.** In section seventy-three of the Principal Act and at the end thereof there shall be inserted the following words:—"Provided that pressure by a creditor shall not be sufficient to exempt any transaction from the operation of this section." (pp. 232, 235, *ante*).

Amendment of  
section 110 of  
No. 1102.

**117.** For section one hundred and ten of the Principal Act there shall be substituted the following section, namely:—

**110. (1)** No distress for rent shall be made levied or proceeded in after sequestration, but the landlord shall be entitled to receive out of the insolvent estate so much rent as shall be then due and payable not exceeding three months' rent and in respect of which there were at the date of sequestration goods on the premises in respect of which the rent was payable liable but for insolvency to distress for rent, and shall be allowed to come in as a creditor and share rateably with the other creditors for the balance. (pp. 285, 317, *ante*).



(2) No person entitled to a preference claim for rent hereunder shall be entitled to more than the value of such goods so distrainable, such value to be fixed by the court in a summary way in the event of the trustee and landlord not agreeing as to the amount. (p. 285, 317, *ante*). SECS. 117-22.

118. (1) There shall out of every estate being administered after the commencement of this Act be paid into the Treasury of Victoria towards the expenses of administering the Insolvency Acts such sum not less than one-eighth of a pound or not exceeding One pound per centum on the **gross**\* produce from time to time of any such estate, and a scale within the limits aforesaid and the time or times of payment may be fixed and varied from time to time by any regulations of the Governor in Council, and such regulations shall within ten days after the making thereof be laid before both Houses of Parliament or if Parliament be not then sitting then within ten days from the date of its meeting. (p. 326, *ante*). Payment of percentage to Treasury.  
\*The word "net" is substituted for the word "gross" by Act No. 1544, post.

(2) Every such payment shall be made by the Chief Clerk the assignee or trustee as the court shall direct. (p. 326, *ante*).

(3) "Estate administered" in this section shall include estate in insolvency or in liquidation by arrangement a composition with creditors under Part IX. of the Principal Act and property assigned by or dealt with under a deed of arrangement as defined by this Act and made after the commencement of this Act. (p. 326, *ante*).

119. Every married woman shall be subject to all the provisions of and entitled to the benefits given by the Insolvency Acts in the same way as if she were a *feme sole*. (pp. 3, 87, 243, *ante*). Married women subject to insolvency law.

120. A person shall not be entitled to vote as a creditor at any meeting of creditors in respect of any unliquidated or contingent debt or any debt the value of which is not ascertained. (pp. 37, 161, *ante*). Persons entitled to vote.  
See E. (1883) Schedule I. (8).

121. A creditor shall not vote in respect of any debt on or secured by a current bill of exchange or promissory note held by him unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the debtor and against whom an order for sequestration in insolvency has not been made and whose affairs are not being liquidated by arrangement and who has not made a statutory composition with his creditors as a security in his hands, and to estimate the value thereof, and for the purposes of voting, and not for the purpose of dividend to deduct it from his proof. (pp. 161, 311, *ante*). Voting in respect of debt secured by bill of exchange.  
See E. (1883) s. 11.

122. It shall be competent for the trustee within twenty-eight days after a proof by or on behalf of any creditor estimating the value of a Power of trustee to require security to be given up.

**SECS. 122-26.** security as aforesaid has been made use of in voting at any meeting to require the creditor to give up the security for the benefit of all the creditors on payment of the value so estimated. (p. 311, *ante*).

See E. (1883) s. 12.

Provided that where a creditor has put a value on such security he may at any time before he has either been required to give up such security or exercised any rights or obtained any advantage by reason of his proof as aforesaid correct such valuation by a new proof and deduct such new value from his debt. (p. 311, *ante*).

Instrument of proxy to be in handwriting of person giving same or of certain other persons.

See E. (1890) s. 22.

**123.** (1) Every instrument of proxy shall be in the prescribed form and every insertion therein shall be in the handwriting of the person giving the proxy or his barrister and solicitor or clerk or of any manager or clerk or other person in his regular employment or of any commissioner of the Supreme Court for taking affidavits or any commissioner for taking declarations and affidavits, and in case any such insertion is in the handwriting of any person other than the person giving the proxy the said instrument shall set forth the name and description of the person in whose handwriting such insertion has been made and the name and description of his employer if any. (p. 159, *ante*).

(2) Unless the provisions of this section are complied with such instrument of proxy shall be invalid. (p. 159, *ante*).

(3) In case of dispute as to compliance with the provisions of this section, the burden of proof shall be upon the person claiming to use the instrument of proxy. (p. 159, *ante*).

Proxy not to vote in certain cases.

See E. (1883) s. 26.

**124.** No person acting under proxy shall vote in favour of any resolution which would directly or indirectly place himself his wife his employer his partner agent clerk or servant in a position to receive any remuneration out of the estate of the insolvent otherwise than as a creditor rateably with the other creditors of the insolvent. (p. 158, *ante*).

Service of notices.

See E. (1883) s. 14.

**125.** All notices and other documents for the service of which no special mode is directed may be sent by prepaid post letter to the last known address of the person to be served therewith. (p. 42, *ante*).

All proceedings to be open to public inspection.

See Insolv. rule 60.

**126.** All proceedings of the court shall remain on record in the court so as to form a complete record of each matter, and they shall not be removed for any purpose except for the use of the officers of the court or by special direction of a Judge of the Supreme Court or the court, but they may at all reasonable times be inspected by any person on payment of the prescribed fee. (p. 360, *ante*).

## FIRST SCHEDULE.

## SCHEDULES.

Section 2.

No. of Act.	Short Title.	Extent of Repeal.
No. 1102 ...	<i>Insolvency Act 1890</i> ...	Sections thirteen, fourteen, fifty-five, fifty-seven, eighty-eight, and one hundred and five.

## SECOND SCHEDULE.

Sections 87, 88,  
90.*Insolvency Act 1897.*SCALE OF FEES. (p. 448, *ante*).

	£	s.	d.
(1) On every certificate indorsed on an original deed and the registration thereof ... ..	0	1	0
(2) On searching Register (for every name inspected and on inspecting the filed copy including the limited extract to be taken pursuant to the Act) . . . . .	0	1	0
(3) On office copies and extracts of or from the filed copy of a deed for every folio of seventy-two words or fractional part of a folio ...	0	0	3
(4) On examining a copy brought in to be marked as an office copy for every folio or fractional part of a folio. ...	0	0	2

# THE INSOLVENCY ACT 1898.

No. 1544.

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AN ACT TO AMEND SECTION 118 OF THE INSOLVENCY ACT 1897.

[26th July, 1898.]

BE it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say) :—

Short Title.

1. This Act may be cited as the *Insolvency Act* 1898.

Amendment of  
section 118 of  
No. 1513.

2. In sub-section (1) of section one hundred and eighteen of the *Insolvency Act* 1897 for the word "gross" there shall be substituted the word "net." (p. 326, *ante*).

# RULES OF THE SUPREME COURT\*

UNDER THE "INSOLVENCY STATUTE 1871." †

(COMPULSORY SEQUESTRATIONS).

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[The figures at the end of the rules relate to the pages of the text where the subject is referred to.]

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*In the Supreme Court of the }  
Colony of Victoria.*

Dated the first day of July, 1884.

WHEREAS by "*The Insolvency Statute 1871*" section 25, it is provided that the Judges of the Supreme Court may make rules in the same way as rules of the Supreme Court might then be made for the purpose of giving effect to the said Act in all matters in which jurisdiction is thereby given to the Supreme Court or a Judge thereof And whereas it is expedient to make the following rules for such purpose: It is ordered as follows:—

1. These rules shall, except rules 14 and 15, come into operation on the 1st day of July, 1884, and, except as hereinafter mentioned, shall apply, so far as may be practicable, to all proceedings taken on or after that day in all causes or matters then pending.

Rules 14 and 15 shall not have any effect until they shall have lain for one calendar month on the table of the Legislative Council and Legislative Assembly, and have been published in the *Government Gazette*.

The rules of the Supreme Court under "*The Insolvency Statute 1871*," of the dates respectively mentioned in the first schedule hereto, except rules 8 and 9 of the rules of 2nd August, 1871 (relating to fees payable to solicitors and to the Crown), are hereby repealed. Rules 8 and 9 of the rules of the 2nd August, 1871, shall be repealed when rules 14 and 15 hereof take effect.

\* *Government Gazette*, 1st July, 1884 (p. 2304).

† These rules are compiled with in practice, and are apparently still in force; vide s. 2, Act of 1890.

**RR. 2-8.** 2. Every appeal against any order of the Court of Insolvency shall be heard on such day of hearing as shall occur first after one clear week from the notice of appeal, or upon such day or days as the Supreme Court shall direct. (p. 19, *ante*).

3. The petition to a Judge of the Supreme Court for an order *nisi* for sequestration under section 39 of "*The Insolvency Statute 1871*" shall be generally verified by the affidavit of the petitioning creditor or creditors, or one of them, as to all the material facts therein stated, and the date of the alleged act of insolvency, or by the affidavit of the duly authorised agent or agents of such creditors or creditor stating, besides the verification of the petition, that he is duly authorised, and disclosing facts within his own knowledge which account for the inability of the creditors or creditor to verify the same; and such petition shall also be verified by the affidavit of the Sheriff's Officer or other person best informed of the fact of the alleged act of insolvency. But the Judge may under circumstances, dispense with the above affidavits, or require further evidence by affidavit or *viva voce* examination upon the above or other matters. (pp. 104, 105, *ante*).

4. The petition and affidavits used for obtaining any such order *nisi* shall, before the same is signed by the Judge, be deposited with him or his Associate. (pp. 105, 133, *ante*).

5. The Associate of the Judge to whom an application is made for an order *nisi* or an order absolute for compulsory sequestration, as the case may be, may issue separate summonses for the examination of witnesses upon the hearing of such application.\* (p. 145, *ante*).

6. All documents used for obtaining an order *nisi* for compulsory sequestration from a Court of Insolvency under the said 39th section, and such order *nisi*, shall be deposited with the Associate of the Judge by whom the application for the order absolute is to be heard, before the hearing thereof, for use at the said hearing or appeal. (pp. 133, 145, *ante*).

7. All orders made by a single Judge exercising the powers of the Supreme Court, either in disposing of orders *nisi* for compulsory sequestration or otherwise in insolvency, may be signed by the Associate of such Judge, and all orders of the Full Court upon appeal may be signed by the Chief Clerk. (pp. 135, 145, *ante*).

8. When an order *nisi* is made absolute, and the petitioning creditor

\* The correct form of summons to give evidence used in practice, and originally prepared by the late Mr. Rose, is set out at the foot of these rules, p. 578.

shall not take out the same within one week, any person interested may apply by summons before a Judge for liberty to take out the same, and the Judge may direct accordingly and order the petitioning creditor to pay the costs and fees necessary for taking out the order and the costs of the application. (p. 145, *ante*). RR. 8-15.

9. When an order *nisi* for compulsory sequestration made by a Judge of the Court of Insolvency or of the Supreme Court is made absolute, discharged, or allowed to lapse, and there is no appeal, or the appeal is disposed of, the Associate of such Judge who shall have the custody of the petition, affidavits, and other documents used at the hearing shall forward the same to the Chief Clerk of the District Court of Insolvency, to be filed in such Court. (p. 145, *ante*).

10. The officer of the Supreme Court to whom the Judge shall forward a copy of his notes of evidence, with the statement of his reasons, under the 12th\* section of the said Act, shall be the Prothonotary. (p. 19, *ante*).

11. All notices in writing of intention to oppose an order *nisi* for compulsory sequestration, and of the grounds of opposing the same, under section 45 of the said Act, shall be filed in the office of the Associate of the Judge by whom the application to make the order absolute is to be heard. (p. 139, *ante*).

12. Costs awarded by any order of the Supreme Court, or any Judge thereof under the said Act, shall be taxed by the taxing officers of such Court. (p. 53, *ante*).

13. The Associate of any Judge of the Supreme Court making an order *nisi* for sequestration under Part IV. of the said Act may sign office copies for service under section 44 thereof. (p. 135, *ante*).

14. The fees payable to solicitors for proceedings before the Supreme Court or a Judge thereof in the insolvency jurisdiction shall be the same as heretofore allowed.† (p. 52, *ante*).

15. The fees payable to the Crown, or to the Consolidated Revenue of Victoria for proceedings before the Supreme Court or a Judge thereof in the insolvency jurisdiction shall be those contained in the second schedule hereto. (p. 53, *ante*).

\* Now s. 11, Act of 1890.

† By r. 8 of the *Supreme Court Rules* 1871, which were superseded by the rules now set out, the costs allowed to solicitors were the same as allowed by the higher scale under "The Common Law Procedure Statute 1865."

SCHEDULES.FIRST SCHEDULE.Date of Rule.

10th February, 1871.

2nd August, 1871.

SECOND SCHEDULE.

	£	s.	d.
Upon every petition for compulsory sequestration or any other object ...	0	5	0
For every affidavit .. ...	0	1	0
For every order nisi for compulsory sequestration ...	0	10	0
For every order absolute for compulsory sequestration when the order nisi is by a Judge of the Supreme Court ...	1	3	0
For every order absolute for compulsory sequestration when the order nisi has been made by a Judge of the Court of Insolvency, an additional fee equal to the fees which should be paid on petition and order nisi if such order had been made by a Judge of the Supreme Court.			
For every other order of the Supreme Court or a Judge thereof ...	0	5	0
For every summons to give evidence ...	0	5	0
For examining and certifying office copies, 1s. for the first folio of ninety words; and 1s. additional for each succeeding ten folios or parts of folios.			
For taxing costs in any case, 3d. in the pound upon the amount allowed in the allocatur.			

By the Court,

WILLIAM F. STAWELL, C.J.,

GEO. HIGINBOTHAM,

E. D. HOLROYD.

(L.S.)

SUMMONS TO GIVE EVIDENCE.COMPULSORY SEQUESTRATIONS.

In the Supreme Court of the } Insolvency Jurisdiction.  
 Colony of Victoria

In the matter of

To

of

You are hereby commanded that laying all business and excuses aside you appear before His Honor, Mr. Justice \_\_\_\_\_ one of the Judges of the Supreme Court at the Law Courts, William Street, Melbourne, on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ of the clock in the forenoon and attend from day to day until this matter shall be disposed of, there to give evidence of what you know in this matter and bring with you \_\_\_\_\_ and all bills of exchange, promissory notes, accounts, books, papers, deeds, and documents in your possession, power or procurement which relate to or are or have been in any manner connected with the above-named respondent or his estate and herein fail not at your peril.

Dated at the Supreme Court, Melbourne, this \_\_\_\_\_ day of \_\_\_\_\_

A.D. 1 .

Associate.



## RULES UNDER PARTS VI. AND VIII. OF THE INSOLVENCY ACT 1897.

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[The figures at the end of the rules relate to the pages of the text where the subject is referred to.]

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1. These rules may be cited as “the Rules under Parts VI. and VIII. of the *Insolvency Act* 1897.” They shall come into operation on the 15th day of August, 1898. Compare the Deeds of Arrangement Act Rules 1888.

2. In these rules, unless the context or subject-matter otherwise requires—

(a) “The Act” shall mean Parts VI. and VIII. of the *Insolvency Act* 1897.

“County Court Registrar” shall mean any Registrar of a County Court to whom a copy of a registered deed, or registered settlement, or copy memorial thereof is transmitted, pursuant to the Act.

“Deed” shall mean any deed of arrangement within the Act.

“Debtor” shall mean any person by, for, or in respect of whose affairs a deed of arrangement within the Act shall be made or entered into, and shall include a firm of persons in co-partnership.

“Settlor” shall mean any settlor of any settlement within the Act.

“Settlement” shall mean any settlement within the Act.

“Registrar” shall mean the Registrar-General.

RR. 2-11.

- (b) Words importing the masculine gender shall be deemed and taken to include females, and the singular to include the plural and the plural the singular.
- (c) Any terms and expressions defined by the Act shall, in these Rules, have the meanings assigned to them by the Act.
3. The affidavits to be filed pursuant to the Act shall be respectively in the forms in the appendix, with such variations as circumstances may require. (p. 444, *ante*).
4. The abstract of any deed to be entered on the Register shall be in the form in the appendix, with such variations as circumstances may require. (p. 446, *ante*).
5. Upon every copy of a deed or settlement which is presented for filing, there shall be indorsed by the person who presents it the name of the debtor or settlor, the date of the deed or settlement, stating the number of folios (of 72 words each) which the deed or settlement contains. (p. 444, *ante*).
6. Where a deed or settlement is registered under the Act, there shall be written thereon a certificate stating that it has been duly registered as prescribed by the Act and the date of such registration. Such certificate shall be signed by the Registrar. (p. 444, *ante*).
7. Upon every copy of a deed or settlement or memorial thereof which is transmitted to a County Court Registrar there shall be written copies of every indorsement or certificate written on the original deed or settlement, or on the filed copy or memorial thereof. Such copies shall be signed by the Registrar. (p. 447, *ante*).
8. The copy of a deed or settlement or memorial thereof may be transmitted to the County Court Registrar by post. (p. 447, *ante*).
9. The County Court Registrar shall number the copies of deeds and settlements or memorial thereof received by him in the order in which they shall respectively be received, and shall file and keep such copies in his office. (p. 447, *ante*).
10. The County Court Registrar shall keep an index, alphabetically arranged, in which he shall enter under the first letter of the surname of the debtor or settlor such surname with his other names, address, and description, and the number which has been affixed to the copy. (p. 447, *ante*).
11. Extracts from the filed copy of a deed or settlement shall be limited to the date of execution and registration, the names, addresses,

and descriptions of the debtor or settlor, and the parties to the instrument, and a short statement of the nature and effect thereof. (p. 447, *ante*). RR. 11-12.

12. The County Court Registrar shall allow any person to search the index kept by him at any time during office hours, and make the extracts permitted by the last preceding rule, upon payment of the same fee as is payable for the time being in the office of the Registrar. The County Court Registrar shall also, if required, cause any office copy to be made of any copy of a deed or settlement or memorial thereof filed in his office, and shall be entitled for making, marking, and sealing the same fee as is payable for the time being for an office copy of a deed or instrument in the office of the Registrar. (p. 447, *ante*).

## APPENDIX.

### FORMS.

#### No. 1.

##### *Affidavit of Execution of Deed.*

I, \_\_\_\_\_ of \_\_\_\_\_ make oath and say—

1. The document produced to me at the time of making this affidavit and marked "A" is a true copy of a deed of (a) \_\_\_\_\_, made by A.B., of \_\_\_\_\_, and of every schedule or inventory thereto annexed or therein referred to and of every attestation of the execution thereof.

(a) State whether deed of assignment of property, deed of or agreement for a composition; a deed of inspectorship; a letter of licence; or an agreement to carry on or wind up debtors' business.

2. The said deed was executed on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, by the said debtor, at \_\_\_\_\_ o'clock in the fore [after] noon. I was present when the said debtor executed the said deed and saw him execute the same.

3. The said (b) \_\_\_\_\_ resides at \_\_\_\_\_ and is a \_\_\_\_\_

(b) Insert name, residence and occupation of debtor.

4. The place or places where the business of the said \_\_\_\_\_ is carried on is (or are) as follows :—

5. The title of the firm (or firms) under which the said debtor carries on business is as follows :—

Sworn, &c.

#### No. 2.

##### *Affidavit of execution where deed is first executed by a creditor.*

I, \_\_\_\_\_ of \_\_\_\_\_ make oath and say—

1. The document produced to me at the time of swearing this affidavit and marked "A" is a true copy of a deed of (a) \_\_\_\_\_, made by A.B., of \_\_\_\_\_, and of every schedule or inventory thereto annexed or therein referred to.

(a) State whether deed of assignment of property; deed of agreement for a composition; a deed of inspectorship; a letter of licence; or agreement to carry on or wind up debtor's business.

Compare the forms under the Deeds of Arrangement Act Rules 1898.

**FORMS.**

(b) Insert name, residence, and occupation of creditor.

2. The said deed was first executed by (b) , a creditor (who resides at ) and is on the day of , 18 , at o'clock in the fore [after] noon. I was present when the said executed the said deed and saw him execute the same.

(c) Insert name, residence, and occupation of debtor.

3. The debtor (c) resides at , and is a

4. The place or places where business of the said debtor is (or are) as follows :—

5. The title of the firm or firms under which the debtor carries on business is as follows :—

Sworn, &c.

No. 3.

*Debtor's Affidavit.*

I, , of , make oath and say—

(a) State whether deed of assignment of property; deed of or agreement for a composition; deed of inspection; a letter of licence; or an agreement to carry on or wind up debtor's business.

1. That on the day of , 18 , I executed a deed of a (a)

(b) The estimated surplus (if any) from securities held by creditors should not be deducted from the gross amount of property.

2. The total estimated amount of my property included under the deed is £ , and the net amount of my property included under the deed, after deducting £ being the value (b) of securities held by creditors and required to cover debts due to them is £

(c) This amount must correspond with the amount of securities above. No deduction should be made in respect of the unsecured balances of partially secured debts.

3. The total estimated amount of my liabilities included under the deed, after deducting £ being the (c) amount covered by securities held by creditors is £

(d) If there is no composition payable, strike this clause out.

4. The total amount of the composition payable is £ (d)

The names of my creditors, with their addresses, and the amount of debt due to or claimed by each of such creditors are contained in and shown by the schedule (signed by me) to this my affidavit.

6. The name of the trustee is , his occupation is , and his address is

No.

*Schedule.*

Name of Creditor.	Address.	Amount of debt due to or claimed after deduction of value of securities held by creditor.

Sworn, &c.

No. 4.

FORMS.

*Affidavit of Execution of Settlement when original is filed.*

- I, \_\_\_\_\_, of \_\_\_\_\_, make oath and say—
1. The document produced to me at the time of swearing this affidavit, and marked "A," is a settlement made by A.B., \_\_\_\_\_, of \_\_\_\_\_, together with all schedules and inventories thereto annexed (or therein referred to).
  2. This said settlement is dated the \_\_\_\_\_
  3. The names, addresses, and descriptions of the parties to such settlement are as follows :—
  4. The names, addresses, and descriptions of the persons intended to be benefited by the said settlement are as follows :—
  5. The place or places where the settlor resides or carries on his business is (or are) :—
  6. The title of the firm or firms under which the settlor carries on business is (or are) :—
  7. The name and address of the trustee under such settlement are :—
  8. The description and estimated value of the property settled by such settlement, and contained in the paper writing filed herewith, are true and correct in every particular.
- Sworn, &c.

No. 5.

*Affidavit of Execution of Settlement when Memorial filed.*

- I, \_\_\_\_\_, of \_\_\_\_\_, make oath and say—
1. The document produced to me at the time of swearing this affidavit, and marked "A," is a memorial of a settlement made by A.B., \_\_\_\_\_, of \_\_\_\_\_.
  2. The said settlement is dated the \_\_\_\_\_
  3. The names, addresses, and descriptions of the parties to such settlement are as follows :—
  4. The names, addresses, and descriptions of the persons intended to be benefited by the said settlement are as follows :—
  5. The place or places where the settlor resides or carries on his business is (or are) :—
  6. The title of the firm or firms under which the settlor carries on business is (or are) :—
  7. The name and address of the trustee under such settlement is :—
  8. The description and estimated value of the property settled by such settlement, and contained in the paper writing filed herewith, are true and correct in every particular.
- Sworn, &c.

No. 6.

*Form of Register.*

Number.	Name of Debtor.	Address.	Place or Places where business carried on.	Description.	Title or Titles of Firms under which Debtor carries on Business.	Name and Address of Trustee (if any).	Nature and effect of Deed, and amount of Composition in the &c.	Amount of Property as estimated by Debtor.			Amount of Liabilities as estimated by Debtor.			Date of Deed.	Date of Registration.
								Gross Amount of Property.	Value of Securities given (excluding any estimated surplus).	Net Value of Property.	Gross amount of Liabilities.	Amount of Deb'ts covered by Securities.	Net Amount of Liabilities.		

31st May, 1898.

JOHN MADDEN,  
Chief Justice.  
J. H. HOOD, J.

# INSOLVENCY RULES 1898.

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GENERAL RULES MADE PURSUANT TO SECTIONS 12, 153,  
AND 154 OF THE INSOLVENCY ACT 1890.

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[The figures at the end of the rules relate to the pages of the  
text where the subject is referred to.]

It is ordered as follows :—

## PRELIMINARY.

Short title and  
commencement  
and application.

1. These Rules may be cited as the Insolvency Rules, 1898, they shall come into operation on the 12th day of March, 1898, and shall also, so far as practicable and unless otherwise expressly provided, apply to all matters pending or arising, and to all proceedings taken in any matters under the Insolvency Acts 1890 and 1897 on or after the said day, except proceedings under Part VI. of the *Insolvency Act* 1897, and any matters in which jurisdiction is given by the *Insolvency Act* 1890 to the Supreme Court or a Judge thereof. (p. 53, *ante*).

Repeal.

2. The Insolvency Rules of the 31st day of January, 1891, and the Insolvency Rules of the 30th day of December, 1897, are hereby annulled. Provided that such annulment shall not affect anything done or suffered before the commencement of these Rules under any rule annulled by these Rules, and that no rule or practice repealed by the said Rules or any of them shall be revived by reason of the annulment affected by these Rules.

## INTERPRETATION OF TERMS.

Interpretation  
of terms.

3. In these Rules, unless the context or subject-matter otherwise requires—

(a) "The Acts" means the *Insolvency Act* 1890 and the *Insolvency Act* 1897.

"The Principal Act" means the *Insolvency Act* 1890.

R. 3.

"Court" means Court of Insolvency.

Rules 1 to 14—  
compare the  
*Bankruptcy*  
*Rules* 1886,  
1 to 17.

"Judge" means Judge of the Court of Insolvency of the district in which the proceedings are being prosecuted.

"Solicitor" means any attorney, solicitor, or barrister entitled to practise in the Supreme Court.

"Affidavit" includes statutory declarations and affirmations.

"Sworn" includes declaring and affirmed according to Statute.

"District," or "the district," means the district of the Judge of the Court of Insolvency in which the insolvent, respondent, or debtor shall reside or to which the proceedings may be transferred, and an insolvent, respondent, debtor, or other person, shall be deemed to reside in that district in which he has lived or carried on business during the six months immediately preceding the sequestration or debtor's summons, or for the longest period during such six months.

"Local paper" means a paper circulating in the locality of the Court of the district in which the proceedings are being prosecuted.

"*Gazette*" means *Victoria Government Gazette*.

"Gazetted" means that the notice or thing is to be published in the *Victoria Government Gazette*.

"Prescribed" means prescribed by the Acts or these Rules or any order made under the Acts.

"Writing" includes print and type-writing, and "written" includes printed and type-written.

"Creditor" includes a corporation and a firm of creditors in partnership. (p. 30, *ante*).

"Debtor" means any debtor whose estate has been sequestrated, or adjudged to be sequestrated, or whose affairs have been liquidated by arrangement, and includes a firm of debtors in partnership, and includes any debtor proceeded against under the Acts, whether adjudged insolvent or not.

"Name of a person" means both the Christian name, or the initial letter, or contraction of the Christian name and the surname of such person.

RR. 3, 4.

"Deed of arrangement" means any deed of arrangement as defined by the *Insolvency Act* 1897.

"Composition" means a composition pursuant to the Acts.

"Sealed" means sealed with the seal of the Court as prescribed.

"Chief Clerk" means Chief Clerk of the Court of the district in which the proceedings are being prosecuted, and in Parts IX. and X. means the Chief Clerk of the district in which the debtor might present a petition for sequestration, and in section 17 of the *Insolvency Act* 1897 means the Chief Clerk of the Court of the district in which any order under that section is made.

"Trustee" means in any insolvency the trustee in such insolvency, and also includes an assignee when acting as trustee, and in any liquidation by arrangement the trustee in such liquidation and under any deed of arrangement the trustee of such deed, and in any composition under section 154 of the Principal Act the trustee in such composition.

"The Official Accountant" means the Official Accountant under Part IV. of the *Insolvency Act* 1897.

"Taxing Officer" means and includes the officer of the Court whose duty it is to tax costs in insolvency proceedings.

"Local Bank" means any bank in or in the neighbourhood of the district in which the proceedings are taken or to which the proceedings may be transferred.

b) Words importing the plural number include the singular, and words importing the singular number include the plural, and words importing the masculine gender include the feminine.

(c) The provisions of section 4 of the *Insolvency Act* 1890 shall apply to these Rules, and any other terms or expression defined by the Acts shall in these Rules have the meanings thereby assigned to them. (p. 16, *ante*).

Computation of  
time.

4. (a) Where by the Acts or these Rules any limited time from or after any date or event is appointed or allowed for the doing of any act or the taking of any proceedings, or for any other purpose then in the computation of that limited time, the same shall be taken as exclusive of the day of that date or of the happening of that event, and as commencing at the beginning of the next following day, and the act or proceeding shall be done or taken at latest on the last day of that



limited time as so computed, unless the last day is a Sunday, Christmas Day, Good Friday, or Monday or Tuesday in Easter week, or a day appointed for public fast, humiliation, or thanksgiving, or a day on which the Court does not sit, in which case any act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, which shall not be one of the days in this rule specified. (pp. 47, 119, *ante*).

RR. 4-6.

(b) Where by the Acts or these Rules any act or proceeding is directed to be done or taken on a certain day, then if that day happens to be one of the days in this rule specified, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, which shall not be one of the days in this rule specified. (p. 47, *ante*).

(c) For the purposes of these Rules "a day on which the Court does not sit" shall mean a day on which the offices of the Court are closed. (p. 47, *ante*).

#### FORMS.

8. The forms in the Appendix where applicable, and where they are not applicable forms of the like character with such variations as circumstances may require, shall be used—where such forms are applicable, any costs occasioned by the use of any other or more prolix forms shall be borne by or disallowed to the party using the same unless the Court shall otherwise direct, provided that the Court or Judge may from time to time alter any forms or substitute new forms in lieu thereof. (p. 69, *ante*).

Use of forms in Appendix.

### PART I.—COURT PROCEDURE.

#### COURT AND CHAMBERS.

6. (1) The following matters and applications shall be heard and determined in open Court (namely) :—

Matters to be heard in Court.

- (a) Examinations under Part VII. of the Principal Act.
- (b) Applications for certificates of discharge.
- (c) Applications to consider, and the consideration of a composition.
- (d) Applications for the release of estates from sequestration.
- (e) Applications to set aside or avoid any settlement, conveyance, transfer, security, or payment, or to declare for or against the title of trustees or assignees to any property adversely claimed.

**RR. 6-12.**

(f) Applications for the committal of any person to prison.

(g) Appeals against the rejection of a proof or applications to admit, reject, expunge, or reduce a proof where the amount of proof exceeds £200.

(h) Applications for the trial of issues of fact with a jury, and the trial of such issues.

Any other matter or application may be heard and determined in Chambers. (pp. 9, 37, *ante*).

(2) Upon the application of any party to a proceeding heard in Court, or during an examination under Part VII. of the Principal Act, on the application of the trustee or assignee the Judge may make an order that all or any witnesses or persons summoned for examination in the matter leave the Court until called on to give evidence.

Adjournment  
from Chief Clerk  
to Court.

7. Any matter or application pending before a Chief Clerk, which under the Principal Act or the Insolvency Rules for the time being in force under the Acts, a Chief Clerk has jurisdiction to determine, shall be adjourned to be heard before the Judge if the Judge shall either specially or by any general direction applicable to the particular case so direct. (p. 9, *ante*).

Adjournment  
from Chambers  
to Court, and  
*vice versa*.

8. Subject to the provisions of the Acts and these Rules any matter or application may at any time, if the Judge thinks fit, be adjourned from Chambers to Court, or from Court to Chambers; and if all the contending parties require any matter or application to be adjourned from Chambers into Court, it shall be so adjourned. (p. 9, *ante*).

### PROCEEDINGS.

Proceedings,  
how instituted.  
Form 1.

9. Every proceeding in Court under the Acts shall be dated, and shall be intituled "The Insolvency Acts" "In the Court of Insolvency," with the name of the district in which it is taken and of the matter to which it relates. Numbers and dates may be denoted by figures. (p. 36, *ante*).

Print, manu-  
script, or  
type-written.

10. All proceedings in Court shall be either in print or manuscript or type-written, or partly in one and partly in another. (p. 36, *ante*).

Notices to be  
in print,  
manuscript, or  
type-written.

11. All notices required by the Acts or these Rules shall be either in print or manuscript or type-written, or partly in one and partly in another, unless the Court shall in any particular case otherwise order. (p. 36, *ante*).

Proceedings to  
be sealed.

12. All summonses, notices, orders, warrants, and other process issued by the Court shall be sealed. (pp. 36, 37, *ante*).

**13.** All office copies of proceedings, affidavits, books, papers, and writings, or any parts thereof required by any assignee, or by any trustee, or by any debtor, or by any creditor, or by the solicitor of any such assignee, trustee, debtor, or creditor shall be provided by the Chief Clerk, and shall, except as to figures, be fairly written at length, and be sealed with the seal of the Court and delivered out without any unnecessary delay, and in the order in which they shall have been bespoken, and be charged and paid for at the rate of 6d. per folio of 72 words. (p. 36, *ante*).

RR. 13-19.

Office copies.

**14.** Whenever any *Gazette* or other newspaper contains any advertisement relating to any application, matter, or proceeding under the Acts or these Rules, one copy of such *Gazette* and newspaper shall be left with the Chief Clerk by the person inserting the advertisement. (p. 36, *ante*).

Filing *Gazette* and local newspaper.

#### TRANSFER OF PROCEEDINGS.

**15.** Every request of creditors to transfer proceedings from one district to another shall be accompanied by an affidavit of some solicitor of the Court verifying the signatures of the creditors signing the request, and stating that such creditors are all or the majority in number of those (as the case may be) who have proved debts in the estate. (p. 13, *ante*).

Request of creditors to be verified by affidavit.  
Compare r. 61  
*Insolvency Rules* 1890

**16.** When an order of transfer has been made under section 9 of the Principal Act the party obtaining such order shall send by post a sealed copy of the order of transfer to the Chief Clerk of the Court of the district affected by the order. (p. 14, *ante*).

Sealed copy of order to be sent to Court affected thereby.  
Compare r. 20,  
*Bankruptcy Rules* 1886.

**17.** Where the proceedings in any matter are transferred from a district to any other district the Chief Clerk of the first district shall send by post the records of proceedings transferred to the Chief Clerk of the district to which the transfer is made. (p. 14, *ante*).

On transfer records of proceedings to be sent to Court of district to which transfer made.  
Compare r. 23,  
*ibid*.

**18.** When any insolvency proceeding has been commenced in a district in which it should not have been commenced the Judge of the Court of such district may order that the proceedings shall be transferred to the district in which the same should have been commenced, or that it be continued in the district in which it was commenced; but unless and until a transfer is made under these Rules the proceeding shall continue in the district in which it was commenced. (pp. 14, 76, *ante*).

Proceedings commenced in wrong district.  
Compare r. 25,  
*ibid*.

#### MOTIONS AND PRACTICE.

**19.** Every application to the Court (unless otherwise provided by these Rules or the Court shall in any particular case otherwise direct)

Applications to be by motion.  
Compare r. 27,  
*ibid*.

**RR. 19-24.** shall be made by motion, and shall, except as to motions under sections 16 and 109 of the Principal Act, and under section 5 of the *Insolvency Act* 1897, be supported by affidavit. (p. 10, *ante*).

Notice of motion and *ex parte* applications.  
Compare r. 28, *Bankruptcy Rules* 1886.

**20.** Where any party other than the applicant is affected by the motion no order shall be made unless upon the consent of such party duly shown to the Court, or upon proof that notice of the intended motion and a copy of the affidavits in support thereof have been duly served upon such party: Provided that the Court if satisfied that the delay caused by proceeding in the ordinary way would or might entail serious mischief may make any order *ex parte* upon such terms as to costs and otherwise and subject to such undertaking (if any) as the Court may think just, and any party affected by such order may move to set it aside.

Length of notice.  
Affidavits to be stated in notice and served therewith.  
Application to serve short notice.  
Compare r. 29, *ibid*.

**21.** Unless the Court gives leave to the contrary or it is otherwise provided by these Rules, notice of motion shall be served on any party to be affected thereby not less than seven days before the day named in the notice for hearing the motion. The affidavits intended to be used in support of the motion shall be stated in the notice and copies thereof served therewith. An application for leave to serve short notice of motion shall be made *ex parte*. Provided that this rule shall not apply to motions under sections 16 and 109 of the Principal Act and under section 5 of the *Insolvency Act* 1897.

Affidavits in reply to be served.

**22.** Where any matter is to be heard upon affidavits, either wholly or in part, the applicant shall, unless the Court or judge shall otherwise order, serve upon the respondent, or if more than one respondent then upon each respondent, copies of all affidavits intended to be used by him in reply not less than two days before the day appointed for the hearing, provided that no further affidavits shall be used upon the hearing unless the Court shall so direct.

Affidavits against motion.  
Compare r. 30, *ibid*.

**23.** Where a respondent intends to use affidavits, in opposition to a motion other than a motion under section 16 and 109 of the Principal Act and under section 5 of the *Insolvency Act* 1897, he shall deliver copies of such affidavits to the applicant or his solicitor not less than four days before the day appointed for the hearing, or within such other time as the Court shall order.

Notice for cross-examination of a deponent.  
Compare Order 33, r. 28 *Supreme Court Rules* (Judicature).

**24.** If either party desires that any deponent shall be in attendance for cross-examination, he shall give notice to the party relying upon the affidavit of such deponent not later than two days before the day of hearing; and if any deponent shall not be in attendance for cross-examination after such notice given as aforesaid, the party to whom

such notice has been given shall not (unless the Court shall otherwise order) in any way make use of the affidavit of such deponent. **RR. 24-32.**

**25.** It shall not be necessary for the party giving such notice to tender the expenses of any deponent required to be in attendance for cross-examination, provided that the Court may at the hearing make any order it may deem fit as to the expense and costs occasioned by such notice. Expenses of deponents need not be tendered. Compare Order 38, r. 28, *Supreme Court Rules* (Judicature).

**26.** If on the hearing of any motion or application the Court shall be of opinion that any person to whom notice has not been given ought to have, or to have had such notice, the Court may either dismiss the motion or application, or adjourn the hearing thereof, in order that such notice may be given upon such terms (if any) as the Court shall think fit. (p. 278, *ante*). Notice not served on all proper parties. Compare r. 31, *Bankruptcy Rules* 1896.

**27.** The hearing of any motion or application may from time to time be adjourned upon such terms (if any) as the Court shall think fit. Adjournment. Compare r. 32, *ibid*.

**28.** In cases in which personal service of any notice of motion or of an order of the Court is required, the same shall be effected, in the case of a notice of motion, by delivering to each party to be served a copy of the notice of motion, and in the case of an order by delivering to each party to be served a sealed copy of the order. Personal service. Compare r. 33, *ibid*.

**29.** Every affidavit to be used on supporting or opposing any opposed notice, in which the time for filing affidavits is not otherwise provided for by these Rules, shall be filed with the Chief Clerk not later than two days before the day appointed for the hearing. (p. 278, *ante*). Filing affidavits. Compare r. 34, *ibid*.

**30.** A party intending to move shall previous to the public sitting of the Court deliver to the Chief Clerk a copy of the notice of motion. There shall be indorsed on such copy the name of the applicant, or the name and place of business of the applicant's solicitor (if any), and also the name of the respondent, or if known, the name and place of business of the respondent's solicitor (if any). (p. 279, *ante*). Notice of motion to be filed. Compare r. 36, *ibid*.

**31.** Except in cases of emergency or for any other cause deemed sufficient by the Court, all motions shall be made and heard in the order in which they are set down at the sitting of the Court. Precedence of motions. Compare r. 37, *ibid*.

**32. (1)** In all cases the party moving the Court or applying to the Judge shall have the carriage of the order whether in his favour or not. Provided that where the same is not procured and served within seven days next following the carriage thereof shall be in his adversary. (p. 279, *ante*). Carriage of order.

**RR. 32-35.**

Notice of  
appointment to  
settle order.

Compare r. 6,  
*Bankruptcy  
Rules 1890.*

- (2) A person who has the carriage of an order shall obtain from the Chief Clerk an appointment to settle the order, and shall give reasonable notice of the appointment to all persons who may be affected by the order or to their solicitors (p. 279, *ante*).

Applications in  
Chambers, how  
made.

Compare r. 56,  
*Insolvency Rules  
1890.*

Affidavits in  
support, opposi-  
tion and reply  
to be served.

- 32A. All applications to a Judge in Chambers, unless *ex parte*, shall be made upon notice in writing, which shall be served 24 hours before the time fixed in the notice. Copies of the affidavits intended to be used in support of the application shall be served with the notice. Copies of the affidavits intended to be used in opposition or in reply shall be served before the hearing.

PROCEDURE ON MOTIONS UNDER SECTIONS 16 AND 109 OF THE PRINCIPAL ACT, AND SECTION 5 OF THE INSOLVENCY ACT 1897, AND ON SUMMONS UNDER SECTION 96 OF THE PRINCIPAL ACT.

Motions under  
sections 16 and  
109 of the  
Principal Act  
and under  
section 5 of the  
*Insolvency Act  
1897.*

33. Any motion under sections 16 and 109 of the Principal Act and under section 5 of the *Insolvency Act 1897* may be set down for hearing after the expiration of fourteen days from the filing and serving on the respondent of the notice of motion, and notice of the day of hearing shall be contained in such notice of motion. Provided that the Court may, upon application made *ex parte*, direct that such hearing take place at an earlier date than herein provided, and give leave to serve short notice of hearing upon such terms and in such manner as the Court shall think fit. Provided, however, that where a notice of motion under sections 16 or 109 of the Principal Act, or under section 5 of the *Insolvency Act 1897*, has been filed, and it is desired by any party thereto to make an application in that motion two days' notice of the same shall be given unless the Court shall otherwise order, and all affidavits filed in answer thereto shall be filed and served at least one day before the hearing of the application. (pp. 12, 13, 276, 277, *ante*).

Contents of such  
notice of motion  
and summons  
under section 96.  
Compare r. 33,  
*Insolvency Rules  
1890.*

34. Such notice of motion and every summons under section 96 of the Principal Act shall contain an address of the applicant or of some solicitor at which notice of defence may be served, and service thereof shall be deemed good service on the applicant. (p. 277, *ante*).

Compare r. 34,  
*ibid.*

35. Such notice of motion shall also contain the name of the person against whom such application is made, and all grounds of equitable or legal claim intended to be relied on, and all necessary particulars of the object of the motion and of the settlement, conveyance, assignment, transfer, gift, delivery, charge, payment, obligation, or proceedings sought to be set aside or avoided, and of the property sought to be

recovered or affected, or the amount of the damages claimed. (p. 277, **RR. 35-42.** *ante*).

**36.** Such notice shall bear an indorsement in the form or to the effect set out in Form No. 117 in the Appendix as nearly as practicable. (p. 277, *ante*).

Indorsement on notice.

**37.** Such notice and every summons under section 96 of the Principal Act shall be served fourteen days at least before the day upon which the same is set down to be heard, unless the Court otherwise order.

Service of notice and summons under section 96 of Principal Act.

Compare r. 38, *Insolvency Rules* 1890.

**38.** If any such motion or summons be opposed notice thereof shall be served upon the applicant at the address given in the notice of motion or summons seven days before the time fixed for hearing. Every such notice of defence shall contain all grounds of legal or equitable defence intended to be relied on, and the address of the defendant or his solicitor, and service at such address shall be deemed sufficient. (p. 277, *ante*).

Notice of defence.

Compare r. 39, *ibid*.

**39.** The claimant or party supporting the proof of debt shall be deemed the plaintiff; and the person against whom the application or summons is directed and the party opposing the proof of debt the defendant; and with the leave of the Court the plaintiff or defendant may amend or add to his notice of motion or summons or defence upon such terms (if any) as to adjournment, security, costs, or otherwise as the Court may think fit. Every notice of motion may be in the Form No. 117 in the Appendix, and every summons under section 96 of the Principal Act shall be in the Form No. 116 in the Appendix, and every notice of defence may be in the Form No. 118 in the Appendix. (pp. 277, 278, *ante*).

Parties to be deemed plaintiff and defendant.

Compare r. 35, *ibid*.

Amendment.

**40.** The plaintiff or defendant upon any such notice of motion or summons may apply to the Court to order particulars, and the Court may order the same upon such terms (if any) as to adjournment, security, costs, or otherwise as it may think fit. (p. 278, *ante*).

Order for particulars.

Compare r. 35, *ibid*.

**41.** Such motion or summons shall be heard upon evidence *viva voce* in the same manner as nearly as may be as a civil trial in the Supreme Court, unless both parties consent that the same shall be heard upon affidavit. (p. 278, *ante*).

To be heard upon *viva voce* evidence or (with consent) upon affidavit.

Compare r. 36, *ibid*.

**42.** The affirmative shall be on the plaintiff unless in the case of a proof which has been already admitted by the Court after opposition, in which case the defendant must satisfy the Court that the proof ought to be expunged. (p. 278, *ante*).

Affirmative to be on plaintiff.

Compare r. 37, *ibid*.

**RR. 43-49.** **43.** Where such notice of motion is based on two or more grounds the applicant must in his case in chief give evidence in support of all the grounds, otherwise he shall be deemed to have abandoned the ground or grounds in support of which no such evidence has been given. (p. 278, *ante*).

**Nonsuit.** **44.** The respondent may before going into his case apply to the Court for an order or decision in his favour as by way of nonsuit.

**How applicant to open.** **45.** The applicant, his counsel or solicitor, may open his case by stating concisely the facts upon which he intends to rely; and the respondent, his counsel or solicitor, may also state concisely his defence, but, save as aforesaid, all arguments shall be heard upon the conclusion of the evidence as on a civil trial in the Supreme Court. (p. 278, *ante*).

**Rules of Supreme Court with reference to trials to apply.** **46.** All Rules now in force in the Supreme Court with reference to trials in civil proceedings shall, so far as the same are applicable, regulate inquiries under any motion under sections 16 and 109 of the Principal Act, under section 5 of the *Insolvency Act* 1897, and summons under section 96 of the Principal Act. (p. 278, *ante*).

**Affidavit in support of motion as to proof of debt.** **47.** With every notice of motion under section 109 of the Principal Act, if such notice is given before or at any meeting for the election of a trustee, there shall be served an affidavit of the applicant and a solicitor stating that such application is *bond fide*, and not to prevent the person claiming to be a creditor voting at the meeting. (p. 276, *ante*).

#### INFANT.

**Infant.** **48.** When any infant is the claimant or plaintiff in any application to the Court under the Acts, the same shall be made by a next friend of such infant and the consent of such next friend to act as such shall be filed before any such application shall be heard, and every next friend shall be liable to costs as if he were a next friend in an action in the Supreme Court. (p. 41, *ante*).

**Guardian ad litem.** **49.** The Court may appoint a guardian *ad litem* to any infant being a party defendant to any application to the Court, and such appointment may be made on the application of the infant or of the claimant or plaintiff, but in the latter case upon four days' notice to the persons in whose custody or care the infant may be, and such guardian shall perform the same duties and be liable in the same way and to the same extent, as nearly as may be, as a guardian *ad litem* in an action in the Supreme Court. (p. 41, *ante*).



PAYMENT INTO COURT.

RR. 50-54.

**50.** Where the defendant is desirous of paying money into Court, it shall, unless with the leave of the Court upon such terms as it may think fit, be paid seven days before the day appointed for the hearing, with the costs (if any) which shall be fixed by the Chief Clerk, and the defendant shall in his notice of defence state that he has paid such money in, and the amount thereof, and whether the same is in satisfaction of the whole or what part of the plaintiff's demand. (p. 59, *ante*).

Payment into Court.  
Compare r. 43,  
*Insolvency Rules*  
1890.

**51.** If the plaintiff intends to accept in full satisfaction of his claim and costs the money paid into Court by the defendant, he shall serve notice thereof on the Chief Clerk and on the defendant four days at least before the day appointed for the hearing and the motion or summons shall be struck out by the Chief Clerk. In default of such notice by the plaintiff the motion or summons shall be heard in due course, and unless the plaintiff recovers more than the amount paid into Court he shall pay the defendant's costs, and the money paid into Court shall remain in Court until after the hearing as a security for payment of such costs; but if the plaintiff accepts the same in full satisfaction the money paid into Court shall be paid out to the plaintiff forthwith after the receipt of his notice of acceptance by the Chief Clerk. The plaintiff or defendant taking money out of Court must produce, if required, an affidavit of identity unless the money is taken out by an attorney. (p. 59, *ante*).

Acceptance in satisfaction of money paid into Court.

Compare r. 44,  
*ibid.*

Affidavit of identity.

SECURITY IN COURT.

**52.** Except where these Rules otherwise provide, where a person is required to give security, such security shall be in the form of a bond, with one or more surety or sureties, to be approved by the Chief Clerk, to the person proposed to be secured, such bond shall be taken in a penal sum, which shall be not less than the sum for which security is to be given, and probable costs, unless the opposite party consents to its being taken for a less sum.

Security by bond.  
Amount of bond.  
Compare rr. 38,  
39, *Bankruptcy*  
*Rules* 1886.

**53.** Bonds entered into by way of securities shall be executed and attested in the presence of the Chief Clerk, or before a justice of the peace, or a commissioner for taking affidavits, or a solicitor, not being the solicitor of the person giving the securities, or a notary public.

Execution of bond.

**54.** The sureties shall make an affidavit of their sufficiency (which shall be in the Form No. 33 in the Appendix) unless the opposite party shall dispense with such affidavit, and such sureties shall attend the Court, to be examined if required.

Justification by surety.  
Compare r. 44,  
*ibid.*

**RR. 55-62.**

Deposit in lieu  
of bond.

Compare r. 40,  
*Bankruptcy  
Rules 1886.*

**55.** Where a person is required to give security he may, in lieu thereof, lodge in Court a sum equal to the sum in question in respect of which security is to be given, and the probable costs of the trial of the question, together with a memorandum to be approved of by the Chief Clerk, and to be signed by such person, his solicitor, or agent, setting forth the conditions on which the money is deposited.

Cases in which  
Chief Clerk to fix  
amount.

**56.** In cases in which the amount in question for which security is to be given or a deposit to be made cannot be calculated, the amount of such security or deposit shall be fixed by the Chief Clerk.

Money lodged  
in Court.

Compare r. 41,  
*ibid.*

**57.** The Rules for the time being in force in civil proceedings in the Supreme Court relating to payment into and out of Court of money lodged in Court by way of security, shall apply to money lodged in Court under these Rules.

Notice in case of  
deposit.

**58.** Where a person makes a deposit of money in lieu of giving a bond, the Chief Clerk shall forthwith give notice to the person to whom the security is to be given of such deposit having been made.

Security of  
guarantee  
society.

Compare r. 42,  
*ibid.*

**59.** The security of a guarantee association or society approved of by the Governor in Council, under the Administration and Probate Acts, or by the opposite party, may be given in lieu of a bond or a deposit.

Notice of  
sureties.

Compare r. 43,  
*ibid.*

**60.** In all cases where a person proposes to give a bond by way of security, he shall serve by post or otherwise on the opposite party, and on the Chief Clerk, notice of the proposed sureties, which shall be in the Form No. 12 in the Appendix, and the Chief Clerk shall forthwith give notice to both parties of the time and place at which he proposes that the bond shall be executed, and shall state in the notice that should the proposed obligee have any valid objection to make to the sureties, or either of them, it must be made at that time.

**AFFIDAVITS.**

Cost of unneces-  
sary matter.

Rr. 61 to 72—  
compare rr. 47 to  
58, *Bankruptcy  
Rules 1886.*

**61.** The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same. (p. 69, *ante*).

Form.

**62.** Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. No costs shall be allowed for any affidavit or part of an affidavit substantially departing from this rule.

**63.** Every affidavit shall state the name, description, and true place of abode of the deponent, and also what facts or circumstances deposed to are within his knowledge. **RR. 63-69.**  
Deponent's name, description, and abode.

**64.** In every affidavit made by two or more deponents the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at the one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents. **Several deponents.**

**65.** The Court may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client. **Scandalous matter.**

**66.** No affidavit having in the jurat or body thereof any interlineation, alteration, or erasure shall, without leave of the Court, be read or made use of in any matter depending in Court unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer or person taking the affidavit, nor in the case of an erasure unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are rewritten and signed or initialed in the margin of the affidavit by the officer or person taking it. **Erasures, &c.**

**67.** Where an affidavit is sworn by any person who appears to the officer or person taking the affidavit to be illiterate or blind, the person taking the affidavit shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature in the presence of such officer or person. No such affidavit shall be used in evidence in the absence of this certificate unless the Court or Judge is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent. **Blind or illiterate persons.**

**68.** The Court or Judge may receive any affidavit sworn for the purpose of being used in any matter notwithstanding any defects by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received. **Formal defects.**

**69. (1)** In cases in which by the present practice an original affidavit is allowed to be used, it shall before it is used be stamped with a proper filing stamp and filed. **Filing office copies, &c.**

**(2)** An office copy of an affidavit may in all cases be used, the original affidavit having been previously filed and the copy duly authenticated with the seal of the Court.

**RR. 70-77.**Swearing of  
affidavit.

**70.** (1) No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any clerk, partner, or agent of such solicitor, or before the party himself. (p. 36, *ante*).

(2) An affidavit may be sworn to either in print or manuscript or type-written, or partly in one and partly in another.

Time for filing.

**71.** (1) Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used unless by leave of the Court.

(2) Except by leave of the Court no order made *ex parte* in Court founded on any affidavit shall be of any force unless the affidavit on which the application was made was actually made before the order was applied for and produced or filed at the time of making the motion.

Proof of affidavit.

**72.** The Court shall take judicial notice of the seal or signature of any officer or person authorized by or under the Act to take affidavits or to certify to such authority. (p. 35, *ante*).

## WITNESSES AND DEPOSITIONS.

Subpœna.

Rr. 73 to 84—  
compare rr. 61 to  
71, *Bankruptcy*  
*Rules 1836.*

**73.** A subpœna for the attendance of a witness shall be issued by the Court at the instance of the Official Accountant, a trustee, a creditor, a debtor, or any applicant or respondent in any matter with or without a clause requiring the production of books, deeds, papers, documents, and writings in his possession or control, and in such subpœna the name of three witnesses may be inserted; a subpœna may be issued in blank, as in the Supreme Court. (pp. 34, 195, 358, *ante*).

Service of  
subpœna.

**74.** A sealed copy of the subpœna shall be served personally on the witness by the person at whose instance the same is issued, or by his solicitor or agent, or by some person in their employ within a reasonable time before the time of the return thereof. (p. 34, *ante*).

Evidence of  
service.

**75.** Service of the subpœna may, where required, be proved by affidavit. (p. 34, *ante*).

Costs of  
witnesses.

**76.** The Court may in any matter limit the number of witnesses to be allowed on taxation of costs, and their allowance for attendance shall in no case exceed the highest rate of the allowance mentioned in the scale of costs. (p. 61, *ante*).

Costs of  
witnesses not  
examined.

**77.** The costs of witnesses, whether they have been examined or not, may in the discretion of the Court be allowed. (p. 61, *ante*).

**78.** The Court may in any matter where it shall appear necessary for **RR. 78-83.**  
the purpose of justice make an order for the examination upon oath **Depositions, &c.**  
before the Court, or any officer of the Court, or any other person, and  
at any place, of any witness or person, and may empower any party to  
any such matter to give such deposition in evidence therein on such  
terms (if any) as the Court may direct. (p. 33, *ante*).

**79.** If the Court shall in any case and at any stage in the proceedings **Shorthand**  
be of opinion that it would be desirable that a person other than the **notes, &c.**  
person before whom the examination is taken should be appointed to  
take down the evidence of the debtor, or of any witness or witnesses  
examined in any matter or in any proceeding heard by or taken before  
it in shorthand or otherwise, it shall be competent for the Court to  
make such appointment, and every person so appointed shall be paid  
the fees prescribed by the Governor in Council under section 12 of the  
*Evidence Act* 1890 (No. 2), to be payable to a shorthand writer licensed  
under the provisions of the said Act, and such fees shall be paid, in the  
first instance, by the party at whose instance any appointment was  
made, or out of the estate, as may be directed by the Court. Provided  
that upon the making of any order such fees may be directed to be paid  
by any party to the proceedings. (p. 360, *ante*).

**80.** Where the assignee or trustee, as the case may be, applies for **Shorthand**  
the appointment of a person to take down in shorthand the evidence of **writers.**  
a debtor at an examination sitting held under section 134 of the  
Principal Act, or of the debtor or his wife or any other person examined  
under section 135 of the said Act, he shall nominate a person for the  
purpose, and the person so nominated shall be appointed, unless the  
Court or Judge shall otherwise order. (p. 360, *ante*).

**81.** An order for a commission to examine witnesses and the writ of **Form of**  
commission shall follow the forms for the time being in use in the **commission.**  
Supreme Court, with such variations as circumstances may require.  
(p. 33, *ante*).

**82.** The Court may, on the application of any party interested, or on **Production of**  
its own motion in any matter at any stage of the proceedings, order the **document.**  
attendance of any person for the purpose of producing any writings or  
other documents named in the order which the Court may think fit to  
be produced.

**83.** Any person wilfully disobeying any subpoena or order requiring **Disobedience**  
his attendance for the purpose of being examined or producing any **of order.**  
document, shall be deemed guilty of contempt of court, and may be  
dealt with accordingly. (p. 34, *ante*).

RR. 84-88.  
Conduct money.

84. Any witness required to attend for the purpose of being examined or of producing any document, shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in the Supreme Court. (p. 61, *ante*).

#### DISCOVERY.

Discovery.  
Compare r. 72,  
*Bankruptcy*  
*Rules 1886.*

85. Any party to any proceeding in Court may, with the leave of the Court, administer interrogatories to or obtain discovery of documents from any other party to such proceeding. Proceedings under this rule shall be regulated as nearly as may be by the Rules of the Supreme Court for the time being in force in relation to discovery and inspection. An application for leave under this rule may be made *ex parte*.

#### NOTICE TO ADMIT DOCUMENTS AND FACTS.

Admissions.  
Compare r. 45,  
*Insolvency Rules*  
1890.

86. A party to any proceeding may call on any other party competent to make admissions to admit any facts or any document, including proof of debt with all annexures thereto admitted against the estate of any insolvent, saving all just exceptions, or to allow proof of any fact by affidavit, and in case of his not admitting the same or allowing such proof by affidavit the cost of proving the facts or documents shall be paid by the party so neglecting or refusing to admit, whatever the result of the proceeding unless the Court shall otherwise order, and no cost of proving any document shall be allowed unless such notice has been given. An affidavit of signature to any admission by the party or his solicitor or clerk shall be sufficient evidence of such admission.

#### NOTICE TO PRODUCE.

Notice to  
produce.  
Compare r. 46,  
*ibid.*

87. Any party to any application to the Court may serve notice on the other party to produce documents and such notice may be proved orally or by the affidavit of the person who served the same, and the costs of proving the same shall be paid by the party refusing to admit the service of such notice to produce.

#### TAKING ACCOUNTS OF PROPERTY MORTGAGED AND OF THE SALE THEREOF.

Inquiry into  
mortgage.  
Rules 88 to 92—  
compare rr. 73 to  
77, *Bankruptcy*  
*Rules 1886.*

88. Upon application by motion by any person claiming to be a mortgagee of any part of the insolvent's real or leasehold estate and whether such mortgage shall be by deed or otherwise and whether the same shall be of a legal or equitable nature the Court shall proceed to inquire whether such person is such mortgagee, and for what consideration and under what circumstances, and if it shall be found that such

person is such mortgagee, and if no sufficient objection shall appear to the title of such person to the sum claimed by him under such mortgage, the Court shall direct such accounts and inquiries to be taken by the Chief Clerk as may be necessary for ascertaining the principal money, interest, and costs due upon such mortgage, and of the rents and profits or dividends, interest, or other proceeds received by such person or by any other person by his order or for his use in case he shall have been in possession of the property over which the mortgage shall extend or any part thereof, and the Court, if satisfied that there ought to be a sale, shall direct notice to be given in such newspapers as the Court shall think fit, when, where, and by whom and in what way the said premises or property or the interest therein so mortgaged are to be sold, and that such sale be made accordingly, and that the assignee or trustee as the case may be (unless it be otherwise ordered) shall have the conduct of such sale, but it shall not be imperative on any such mortgagee to make such application. At any such sale the mortgagee may bid and purchase. (p. 208, *ante*). RR. 88-92.

89. All proper parties shall join in the conveyance, transfer, or assurance to the purchaser as the Court shall direct. (p. 208, *ante*). Conveyance.

90. The moneys to arise from such sale shall be applied in the first place in payment of the costs, charges, and expenses of the assignee or trustee (as the case may be) of and occasioned by the application to the Court, and of such sale and attendance thereat, and in the next place in payment and satisfaction so far as the same shall extend of what shall be found due to such mortgagee for principal money, interest, and costs, and the surplus of the said moneys (if any) shall then be paid to the assignee or trustee (as the case may be). But in case the moneys to arise from such sale shall be insufficient to pay and satisfy what shall be so found due to such mortgagee, then he shall be entitled to prove as a creditor for such deficiency, and receive dividends thereon rateably with the other creditors, but so as not to disturb any dividend then already declared. (pp. 208, 282, *ante*). Proceeds of sale.

91. For the better taking of such inquiries and accounts and making a title to the purchaser all parties may be examined by the Court upon interrogatories or otherwise, as the Court shall think fit, and shall produce before the Court, upon oath, all deeds, papers, books, and writings in their respective custody or power relating to the estate or effects of the insolvent, as the Court shall direct. (p. 208, *ante*). Proceedings on inquiry.

92. In any proceedings between a mortgagor and mortgagee, or the assignee or trustee of either of them, the Court may order all such in- Accounts, &c.

**RR. 92-97.** quires and accounts to be taken in like manner as in the Supreme Court. (p. 208, *ante*).

#### DISCOVERY OF DEBTOR'S PROPERTY.

Application for  
discovery.  
Compare r. 78,  
*Bankruptcy*  
*Rules 1886.*

**93.** Every application to the Court under section 135 of the Principal Act shall be in writing, print, or type written, and shall state *shortly* the grounds upon which the application is made. (p. 358, *ante*).

#### APPROPRIATION OF PAY, HALF-PAY, SALARY, EMOLUMENT, OR PENSION.

Notice to  
insolvent of  
application.  
Rules 94 to 96—  
compare rr. 79 to  
82, *ibid.*

**94.** When an assignee or trustee intends to apply to the Court for an appropriation order under section 99 of the Principal Act, he shall give to the insolvent notice of his intention to do so. Such notice shall specify the time and place fixed for hearing the application, and shall state that the insolvent is at liberty to show cause against such order being made. The notice shall be in the Form No. 105 in the Appendix, with such variations as circumstances may require. (p. 259, *ante*).

Copy of order  
to chief of  
department.

**95.** Where an order is made under section 99 of the Principal Act, the Chief Clerk shall give to the assignee or trustee, as the case may be, a sealed copy of the order, who shall communicate the same to the chief of the Department or other person under whom the pay, half-pay, salary, emolument, or pension is enjoyed. (p. 259, *ante*).

Review of order.

**96.** Where an order has been made for the payment by an insolvent, or by his employer for the time being, of a portion of his income or salary, the insolvent may, upon his ceasing to receive a salary or income of the amount he received when the order was made, or upon the happening of any event affecting his financial position, apply to the Court to rescind the order or to reduce the amount ordered to be paid by him to the assignee or trustee; and the assignee or trustee, as the case may be, may upon the insolvent receiving a salary or income of an amount greater than that received by the insolvent when the order was made, or upon the happening of any event affecting the financial position of the insolvent, apply to the Court to increase the amount ordered to be paid by the insolvent to the assignee or trustee, as the case may be. (p. 259, *ante*).

#### WARRANTS, ARRESTS, AND COMMITMENTS.

To whom  
warrants  
addressed.  
Rules 97 to 101—  
compare rr. 83 to  
87, *ibid.*

**97.** A warrant of seizure or a search warrant, or any other warrant issued under the provisions of the Acts shall be addressed to a messenger of the Court or to such officer of the Court or to such other person as the Court may in each case direct. (pp. 27, 37, 165, *ante*).



**98.** Where a debtor is arrested under a warrant issued under section **RR. 98-103.** 129 of the Principal Act, he shall be given into the custody of the governor or keeper of the prison mentioned in the warrant, who shall produce such debtor before the Court, as it may from time to time direct, and shall safely keep him until such time as the Court shall otherwise order, and any books, papers, moneys, goods, and chattels in the possession of the debtor, which may be seized, shall forthwith be lodged with the assignee or trustee, as the case may be. (p. 349, *ante*).

Custody and production of debtor.

**99.** An application to the Court to commit any person for contempt of Court shall be supported by affidavit, and be filed in the Court in which the proceedings are being prosecuted. (p. 26, *ante*).

Application to commit.

**100.** Subject to the provisions of the Acts and Rules upon the filing of an application to commit, the Chief Clerk shall fix a time and place for the Court to hear the application, notice whereof shall be personally served on the person sought to be committed not less than three days before the day fixed for the hearing of the application. Provided that in any case in which the Court may think fit, the Court may allow substituted service of the notice by advertisement, or otherwise, or shorten the length of notice to be given. (p. 26, *ante*).

Notice and hearing of application.

**101.** Where an order of committal is made against a debtor, or against an assignee, or trustee, for disobeying any order of the Court, to do some particular act or thing, the Court may direct that the order of committal shall not be issued, provided that the debtor, assignee, or trustee, as the case may be, complies with the previous order within a specified time. (p. 26, *ante*).

Suspension of issue of committal order.

#### EXECUTION.

**102.** Writs of execution may be in the Forms Nos. 124A to 130 in the Appendix or as near thereto as the circumstances of the case may require, and such writs, when sealed, may be delivered to the sheriff or other officer to whom the execution of the like writs issuing out of the Supreme Court belongs, and shall be executed by such sheriff or other officer, as nearly as may be, in the same manner in which he doth or ought to execute such like writs, and for the execution of such writs, such sheriff or other officer shall be allowed such fees as are or shall be from time to time allowed in like cases in the Supreme Court. (p. 10, *ante*).

Writs of execution. Compare r. 68, Insolvency Rules 1890.

**103.** (1) Writs of execution shall be tested in the name of the Judge of the district and of the day when actually issued, and be made returnable immediately after the execution thereof. (p. 10, *ante*).

How tested, &c. R. 69, *ibid*.

**RR. 103-10.**

Præcipe.

(2) At the time of issuing any writ of execution the solicitor causing the same to be issued shall file a præcipe thereof with the Chief Clerk according to Form No. 124 in the Appendix. (p. 10, *ante*).

## SERVICE AND EXECUTION OF PROCESS.

Address of solicitor for service.

Rules 104 to 108—compare rr. 80, 90, 92 and 98, *Bankruptcy Rules 1886*.

Hours for service.

**104.** Every solicitor suing out or serving any petition, notice, summons, order, writ of execution, or other document, shall indorse thereon his name or firm, and place of business, which shall be called his address for service—all notices, orders, documents, and other written communications, which do not require personal service, shall be deemed to be sufficiently served on such solicitor if left for him at his address for service. (pp. 21, 41, *ante*).

**105.** Service of notices, summonses, orders, or other documents and proceedings, shall, in cases other than that of personal service, be effected before the hour of Five of the clock in the afternoon, except on Saturdays when it shall be effected before the hour of One in the afternoon. (p. 42, *ante*).

**106.** Such service effected after Five in the afternoon on any week day except Saturday shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day. Such service effected after One in the afternoon on Saturday shall for the like purpose be deemed to have been effected on the following Monday. (p. 42, *ante*).

How served by post.

**107.** Where notice or other document or proceeding may be served by post it shall be sent by registered letter. (p. 42, *ante*).

Enforcement of order.

**108.** Every order of the Court may be enforced as if it were a judgment of the Court to the same effect. (p. 3, *ante*).

Service of orders on insolvent.

**109.** Every insolvent shall, until he obtains his certificate, keep his assignee or trustee informed of his true place of residence and business, and any order, summons, notice, or other proceeding, unless by the Acts or these Rules otherwise provided, posted by prepaid registered letter to or delivered at the address given by him shall be deemed served upon the insolvent. (pp. 42, 340, *ante*).

## TRIAL BY JURY.

*Settlement of Issues for Trial.*

Settlement of issues for trial. Compare r. 94, *ibid*.

**110.** Where upon any application to the Court for its decision on any question, the Court, with or without the application of any person, shall have directed that a question of fact be tried with a jury, such question

of fact shall be reduced into writing and submitted to the Judge for his approval, and shall, when approved, be signed by the Judge and filed, and shall be called the record for trial, but the Court shall have power to allow any amendment thereof at any time upon such terms as the court may think fit. (p. 19, *ante*). RR. 110-18.

111. An order of the Court for the trial of a question of fact before a jury in the Supreme Court or the Court shall specify the place of trial and whether it shall be before a special jury of six men or a special jury of twelve men, but the order may be amended by the substitution of one jury for the other upon such terms as the Court may think fit. (p. 19, *ante*). Special jury of six or twelve men in the Court or Supreme Court. Compare r. 95, Bankruptcy Rules 1896.

112. An order of the Court for the trial of a question of fact before a jury in the County Court shall specify the place of trial and whether it shall be before four or six jurors. (p. 19, *ante*). A jury of four or six in the County Court.

113. The issues of fact approved by the Court shall be tried in a County Court according to the Rules for the time being in force in relation to jury trials in County Courts and in the Court or in the Supreme Court in the same manner as if it were the trial by a jury of an issue of fact in an action in the Supreme Court. (p. 19, *ante*). Trial of issues of fact in County Courts. Compare r. 96, *ibid*.

114. Where such issues are ordered to be tried in the Supreme Court, or a County Court, the verdict or finding of the jury shall be indorsed by the proper officer on the record for trial and returned by him to the Chief Clerk. (p. 19, *ante*). Indorsement on record for trial of verdict or finding. Compare r. 97, *ibid*.

115. Where such issues are ordered to be tried in the Court, the Chief Clerk shall, within three days after the filing the record, fix the time and place at which the trial shall be had. (p. 19, *ante*). Time and place of trial.

116. Where such trial is to take place in the Court, the Chief Clerk shall issue a precept according to the Form in the 6th Schedule to the *Juries Act* 1890, and shall deliver it to the Sheriff ten days at least before it is returnable. (p. 19, *ante*). Issue of precept.

117. Where such trial is to take place in the Court the sum to be paid as fees for jurors shall be £2 2s. in case of a special jury of six men, and £4 4s. in case of a special jury of twelve men. (p. 19, *ante*). Deposit for expenses of jury; scale of payment.

118. The mode and practice of proceeding in the Court to nominate and reduce a jury shall be the same in all respects as are now or for the time being shall be in force in the Supreme Court, when a special jury is ordered to be struck, or as near thereto as the practice of that Court will admit. (p. 19, *ante*). Nomination and reduction of jury.

**RR. 119-26.** **119.** The Chief Clerk shall attend on a trial before a jury in the Court, and the jurors shall be called and sworn by him. The witnesses shall be called and sworn by the usher of the Court. (p. 19, *ante*).

Swearing jury and witnesses.

**120.** Upon every such trial in the Court, the addresses to the jury or to the Court, as the case may be, shall be regulated as follows :—The party who begins, or his counsel or solicitor, shall be allowed in the event of his opponent not announcing at the close of the case of the party who begins, his intention to adduce evidence to address the jury a second time at the close of such case for the purpose of summing up the evidence ; and the party on the other side, or his counsel or solicitor, shall be allowed to open the case and also to sum up the evidence (if any), and the right to reply shall be the same as at present in force in the Supreme Court on civil trials. (p. 19, *ante*).

Addresses to the jury or Court.

**121.** Where the jury retire from the Court to consider their verdict they shall be taken charge of by an officer of the Court ; but previously thereto the Chief Clerk shall swear such officer according to the Form No. 179 in the Appendix. (p. 19, *ante*).

Retirement of jury.

**122.** Where such issues are tried in the Court, the verdict or finding of the jury, as the case may be, shall be indorsed by the Chief Clerk on the records for trial, and with the jury panel and the names of the jurors who were sworn indorsed thereon. (p. 19, *ante*).

Indorsement on record.

#### CHIEF CLERK.

**123.** The Chief Clerk shall submit any matter before him upon which he is doubtful or which the parties, or either of them, desire should be submitted to the Judge for his opinion and order. (pp. 29, 154, *ante*).

Chief Clerk to take opinion of Court.

Compare r. 31, *Insolvency Rules* 1890.

One Chief Clerk may act for another.

Compare r. 102 *Bankruptcy Rules* 1886.

Office hours of Chief Clerk.

Compare r. 103, *ibid*.

**124.** Any Chief Clerk may act for any other Chief Clerk in any matter in relation to his office. (p. 29, *ante*).

**125.** The office of the Chief Clerk shall be kept open daily throughout the year from ten till four o'clock, except on Sunday, Christmas Day, Good Friday, the Saturday after Good Friday, Monday and Tuesday in Easter week, or any day appointed for a public fast or thanksgiving, and except also on Saturdays, when the office may be closed at twelve o'clock. Provided that during vacations of the Court the office may be closed at twelve.

Register-books of generally qualified trustees.

**126.** The Chief Clerk of the Court of each district shall keep a book, in which he shall enter the name, address, and description of every person who, under section 17 of the *Insolvency Act* 1897, may be ordered by the Court to be registered as qualified to be appointed to the office

of trustee under the Insolvency Acts, with the date of the order and the district in which the same was made, and the date of such entering. (p. 168, *ante*). RR. 126-32.

127. The Chief Clerk of the Court of each district shall transmit by post to the Official Accountant, and to the Chief Clerk of the Court of every other district, an office copy of every order made under section 17 of the *Insolvency Act* 1897, by the Court of the district of which he is Chief Clerk, and every Chief Clerk on receiving such office copy order shall forthwith enter in the register-book kept by him the name, address, and description of the person therein named, with the date of the order, and the district in which the same was made, and the date of such entering. (p. 168, *ante*).

Chief Clerk to transmit copy order to every other Chief Clerk and Official Accountant.  
To enter particulars of order in register-book.

128. The Chief Clerk of the Court of each district shall, on any order being made under section 17 of the *Insolvency Act* 1897, for the cancellation of the registration of any such person, forthwith strike out the name of such person from the register-book kept by him, and make entry therein of the date of the order, and the district in which it was made, and shall transmit by post to the Official Accountant and the Chief Clerk of the Court of every other district an office copy of such order of cancellation, and every Chief Clerk shall forthwith, on receiving such office copy order, strike out the name of such person from the register-book kept by him, and make entry therein of the date of the order, and the district in which it was made, and the date of such entry. (p. 168, *ante*).

Entry to be made of cancellation of qualification.

129. Every Chief Clerk shall also keep a book, in which he shall enter the name, address, and description of every person who, under section 18 of the *Insolvency Act* 1897, may be ordered by the Court of his district to be registered as qualified to be appointed to the office of trustee under the Insolvency Acts, in respect of any particular estate, with the date of such order and of such entry. (p. 168, *ante*).

Register-book of trustee qualified for particular estate.

130. Every Chief Clerk shall, on any order being made by the Court of his district for the cancellation of the registration of any person mentioned in the last preceding rule, strike out the name of such person from the register-book kept by him, and make entry therein of the date of the order, and of such entry. (p. 168, *ante*).

On order for cancellation name to be struck out of register.

131. The notice required by sub-section (3) of section 30 of the *Insolvency Act* 1897 to be advertised in the *Government Gazette* shall be in the Form No. 36A in the Appendix. (p. 174, *ante*).

Form of notice under section 30 of Act 1897.

132. Any person shall be entitled at all reasonable times to search the register-books kept by any Chief Clerk on payment of One shilling or such other fee as may from time to time be prescribed. (p. 168, *ante*).

Register-books open to inspection.

**RR. 133-40.**

Chief Clerk to telegraph to Melbourne every order of sequestration.  
Compare r. 14, *Insolvency Rules* 1890.

Chief Clerk to telegraph Sheriff notice of order of sequestration.  
Compare r. 16, *ibid.*

Indorsement and filing of affidavits.  
Compare r. 35, *Bankruptcy Rules* 1896.

Filing *Gazette*.  
Compare r. 17 (1), *ibid.*

Filing newspaper.  
Compare r. 17 (2), *ibid.*

Preparation of orders.  
Compare r. 5, *Bankruptcy Rules* 1890.

List of estates to be forwarded to the Treasurer in which statements of application and disposal of estate have not been filed.

Compare r. 113, *Insolvency Rules* 1890.

Awarding costs.  
Rules 140 to 147—compare rr. 108 to 117, *Bankruptcy Rules* 1896.

**133.** The Chief Clerk forthwith upon any order of sequestration being made shall telegraph to the Chief Clerk of the Court at Melbourne that such order has been made. (p. 72, *ante*).

**134.** The Chief Clerk shall, upon the request of the assignee or any creditor, and upon payment of the sum of Five shillings telegraph to the Sheriff notice that such order has been made. (pp. 73, 134, *ante*).

**135.** The Chief Clerk, upon any affidavit being left with him to be filed, shall indorse the same with the day of the month and year when the same was so left, and forthwith file the same with the proceedings to which the same relates, and any affidavit left with the Chief Clerk to be filed, shall on no account be delivered out to any person, except by order of the Court. (pp. 30, 134, *ante*).

**136.** Whenever any *Gazette* containing any advertisement relating to any application matter or proceeding shall be left with the Chief Clerk, he shall file the page of the *Gazette* in which the advertisement appears with the proceedings in the application matter or proceeding. (p. 30, *ante*).

**137.** Whenever any local or other paper containing any advertisement relating to any application matter or proceedings shall be left with the Chief Clerk he shall file the same with the proceedings in the application matter or proceedings. (p. 30, *ante*).

**138.** If within one week from the making of an order of sequestration, order on application to approve a composition, order annulling a composition, or order on application for a certificate of discharge, such order has not been completed, it shall be the duty of the Chief Clerk to prepare and complete such order, provided that if in any case the Judge shall be of opinion that the provisions of this Rule ought not to apply he may so order. (p. 30, *ante*).

**139.** The Chief Clerk of the Court in each district, upon the expiration of fourteen days from the first days of the months of January, April, July, and October in each year, shall forward a list to the Honorable the Treasurer of the Colony of Victoria of all estates in which the statements mentioned in Rules 351 and 353 of these Rules properly verified have not been filed unless final statements have been filed in each of the said estates. (p. 339, *ante*).

#### COSTS.

**140.** (1) The Court, in awarding costs, may direct that the costs of any matter or application shall be taxed and paid, as between party and party, or as between solicitor and client, or the Court may fix a sum to be paid in lieu of taxed costs. (p. 50, *ante*).

(2) In the absence of any expressed direction costs of an opposed **RR. 140-46.**  
**motion shall follow the event, and shall be taxed as between party and**  
**party. (p. 50, ante).**

**141.** Every order for payment of money and costs, or either of them, **Orders to be sealed, signed, and filed.**  
**shall be sealed, and be signed by the Chief Clerk, and shall be forthwith**  
**filed with the proceedings. (p. 51, ante).**

**142.** The costs directed by any order to be paid shall be taxed on pro- **Taxation of costs.**  
**duction of an office copy of such order, and the allocatur, being duly**  
**stamped, shall be signed and dated by the Chief Clerk taxing the costs.**  
**(p. 51, ante).**

**143.** (1) All bills of costs, charges, fees, and disbursements in matters **Chief Clerk to tax.**  
**under the Acts shall be taxed by the Chief Clerk, subject to the revision**  
**of the Court. (p. 51, ante).**

(2) The scale of costs set forth in the Appendix, and the regulations **Scale of costs and charges.**  
**contained in such scale, shall, subject to these Rules, apply to the taxation**  
**and allowance of costs and charges in all proceedings under the Acts and**  
**these Rules. (p. 50, ante).**

**144.** The solicitor in the matter of a petition presented by a debtor **Solicitor's costs in case of petition by debtor.**  
**under Part III. of the Principal Act shall, in his bill of costs, give**  
**credit for such sum or security (if any) as he may have received from**  
**the debtor as a deposit on account of the costs and expenses to be**  
**incurred in and about the filing and prosecution of such petition, and**  
**the amount of any such deposit shall be noted by the Chief Clerk upon**  
**the allocatur issued for such costs.**

**145.** (1) Upon the taxation of any bill of costs, charges or expenses **Bill of costs to be filed.**  
**being completed, the Chief Clerk shall forthwith file such bill with the**  
**proceedings in the matter, and shall thereupon issue to the person pre-**  
**senting such bill for taxation his allocatur or certificate of taxation,**  
**which shall be in the Form No. 110 or 111 in the Appendix. (p. 51,**  
**ante).**

(2) When a bill of costs is taxed under any special order of the **Costs paid otherwise than out of estate.**  
**Court, and it appears by such order that the costs are to be paid other-**  
**wise than out of the estate of the insolvent the taxing officer shall**  
**specially note upon the allocatur by whom, or the manner in which, such**  
**costs are to be paid. (p. 51, ante).**

**146.** Every Chief Clerk shall keep a register of all bills taxed by him **Register of bills taxed.**  
**according to Form No. 112 in the Appendix, and shall, within fourteen**  
**days of the 31st day of December in each year, make a return to the**

**RR. 146-53.** Official Accountant, according to Form No. 113 in the Appendix, of all bills taxed by him during the twelve months preceding such 31st day of December.

Certificate of employment.

**147.** Before taxing the bill or charges of any solicitor, accountant, auctioneer, broker, or other person employed by an assignee or trustee, the taxing officer shall require a certificate, in writing, signed by the assignee or trustee, as the case may be, to be produced to him, setting forth whether any, and if so, what special terms of remuneration have been agreed to. (p. 51, *ante*).

Attendance of Trustee at taxation of costs. Compare r. 75, *Insolvency Rules* 1890.

**148.** The trustee, if required by the Chief Clerk or other taxing officer, shall, either personally or by his attorney, attend before the Chief Clerk or other taxing officer on the taxation of all costs relating to the estates of which he is trustee. (p. 52, *ante*).

Notice of appointment. Compare r. 120, *Bankruptcy Rules* 1896.

**149.** Every person whose bill or charges is or are to be taxed shall, in all cases, give not less than three days' notice of the appointment to tax the same to the assignee or trustee, as the case may be. (p. 51, *ante*).

Copy of bill. Compare r. 122, *ibid.*

**150.** Every person whose bill or charges is or are to be taxed shall, on application either of the Official Accountant or the assignee or trustee, furnish a copy of his bill or charges so to be taxed on payment of 6d. per folio, which payment may be charged to the estate. (pp. 51, 195, *ante*).

Official Accountant to call attention to items.

**151.** The Official Accountant shall call the attention of the Chief Clerk to any items which in his opinion ought to be disallowed or reduced. (pp. 52, 195, *ante*).

If more than one-sixth disallowed.

**152.** If the bill of costs of any solicitor in the matter of a petition presented under Parts III. or IV. of the Principal Act, or of any solicitor employed by an assignee or trustee, when taxed be less by a sixth part than the bill delivered, then such solicitor, or the executors, administrators, or assignee of such solicitor, or the trustee of his estate, shall pay the costs of taxation.

Application for costs. Compare r. 123, *ibid.*

**153.** When any party to or person affected by any proceeding desires to make an application for an order that he be allowed his costs, or any part of them incident to such proceeding, and such application is not made at the time of the proceeding—

- (1) Such party or person shall serve notice of his intended application on the assignee or trustee.



(2) The assignee or trustee may appear on such application and object thereto. RR. 153-55.

(3) No costs of or incident to such application shall be allowed to the applicant unless the Court is satisfied that the application could not have been made at the time of the proceeding. (pp. 49, 50, *ante*).

**184.** The assets in every matter remaining after payment of the actual expenses incurred in realizing any of the assets of the debtor shall, subject to any order of the Court, be liable to the following payments, which shall be made in the following order of priority, namely :—

Priority of costs and charges payable out of estate.  
Compare r. 125, Bankruptcy Rules 1896.

First.—The taxed costs of sequestration under Part III. or IV. of the Principal Act.

Next.—The actual expenses incurred by the assignee in protecting the property or assets of the insolvent or any part thereof, and any expenses or outlay incurred by him or by his authority in carrying on the business of the insolvent and allowed by the Court.

Next.—The percentage payable under section 118 of the *Insolvency Act* 1897.

Next.—The remuneration of the assignee.

Next.—The taxed charges of any shorthand writer appointed by the Court.

Next.—The trustee's necessary disbursements other than actual expenses of realization heretofore provided for.

Next.—The costs of any person properly employed by the trustee.

Next.—Any allowance made to the debtor by the trustee under section 120 of the Principal Act.

Next.—The remuneration of the trustee.

Next.—The actual out-of-pocket expenses necessarily incurred by the committee of inspection. (pp. 53, 54, *ante*).

**185.** Where, at the instance of the assignee or trustee, a shorthand writer is appointed to take notes of the examination of the debtor, or of any witness or witnesses, the cost of such notes shall be deemed to be an expense incurred by the assignee or trustee, as the case may be, and shall be payable out of the estate of the insolvent in the order of priority in which such expenses are respectively payable under the provisions of this rule.

Costs of shorthand notes.  
Compare r. 10, Bankruptcy Rules 1896.

**RR. 156-58.** **156.** In the case of an insolvency, petition by or against a firm or partnership, the costs payable out of the estates incurred up to and inclusive of the close of the meeting for the election of trustee shall be apportioned between the joint and separate estates in such proportions as the assignee or trustee, as the case may be, may in his discretion determine. (p. 329, *ante*).

Apportionment of costs in case of partnership.

Compare r. 127, *Bankruptcy Rules* 1886.

Costs out of joint or separate estates.

Compare r. 128, *ibid*.

**157.** (1) Where the joint estate of any co-debtors is insufficient to defray any costs or charges properly incurred prior to the appointment of the trustee, the trustee may pay such costs or charges out of the separate estates of such co-debtors, or one or more of them, in such proportions as in his discretion the trustee may think fit. The trustee may also pay any costs or charges properly incurred prior to his appointment for any separate estate out of the joint estate or out of any other separate estate, and any part of the costs or charges of the joint estate incurred prior to the appointment of the trustee which affects any separate estate out of that separate estate. (pp. 328, 329, *ante*).

(2) Where the joint estate of any co-debtors is insufficient to defray any costs or charges properly incurred after the appointment of the trustee, the trustee, with such consent as is hereinafter mentioned, may pay such costs or charges out of the separate estates of such co-debtors or one or more of them. The trustee, with the said consent, may also pay any costs or charges properly incurred for any separate estate after his appointment out of the joint estate, and any part of the costs or charges of the joint estate incurred after his appointment which affects any separate estate out of that separate estate. No payment under this rule shall be made out of a separate estate or joint estate by a trustee without the consent of the Committee of Inspection of the estate out of which the payment is intended to be made (if any), or if there be no committee, or if such committee withhold or refuse their consent, without an order of the Court. (pp. 328, 329, *ante*).

#### APPEALS.

On appeal to Supreme Court production of papers.

Compare r. 76, *Insolvency Rules* 1890.

**158.** Upon any appeal to the Supreme Court (if the papers in the estate are not kept in the office of the Court in the Melbourne District) the Chief Clerk of the Court in whose custody such papers are shall forward the same to the Chief Clerk at Melbourne by registered letter, upon the request of the appellant or respondent, upon payment of the fee of £1 ; and the Chief Clerk of the Court at Melbourne (if the papers are in his custody or have been transmitted to him), or some other clerk deputed by him, shall attend the Supreme Court upon any appeal with the papers in the estate. After any appeal shall have been disposed of

by the Supreme Court the Chief Clerk at Melbourne shall return the papers, by registered letter, to the Chief Clerk of the district from whom he received the same. (pp. 19, 21, *ante*). **RR. 158-61.**

**159.** Whenever an order of a Judge is appealed against, the appellant or the solicitor for the appellant shall forthwith obtain, make, and prepare, at his own cost and charges, a fair copy of the Judge's notes of the evidence taken before him in the matter of such order, and shall pay to the officer or person appointed by the Judge to make such copy the sum of 1s. per folio for his own use ; and shall as soon as may be send or deliver the same, together with a copy of the appeal notice, to the Judge, to be by him forwarded to the Supreme Court together with a statement of his reasons for making such order. (pp. 19, 21, *ante*). Judge's notes of evidence. Compare r. 77, Insolvency Rules 1890.

**SPECIAL CASE UNDER SECTION 9 OF THE "INSOLVENCY ACT 1897."**

**160.** The party (hereinafter called the applicant) at whose instance or in consequence of whose opposition any question of law by way of special case shall be transmitted to the Supreme Court shall prepare the case, and he shall deliver the same to the opposite party or to the solicitor engaged on his behalf ; and if there be several such parties appearing separately, or by separate solicitors, then a copy to each of such parties or to each of the solicitors so engaged within fourteen days after request made for transmission of such question to the Supreme Court ; and such parties, hereinafter called the respondents, shall return the case to the applicant indorsed as either agreed to or dissented from within fourteen days after the respondent shall have received the same. (p. 16, *ante*). Preparation of special case. Compare r. 375, County Court Rules 1891.

**161.** If the respondent do not return to the applicant the case indorsed as agreed to within the time fixed by the last preceding rule, or if he return it with amendments to which the applicant cannot agree, the applicant shall forthwith file with the Chief Clerk an affidavit showing that he has complied with the provisions of the last preceding rule, and that the respondent has not agreed to the case or has returned it with amendments to which the applicant cannot agree, and the applicant shall, at the same time, deliver to the Chief Clerk a copy of the case as stated by himself together with the case (if any) as amended by the respondent ; and the Chief Clerk shall thereupon transmit the same together with the said affidavit to the Judge, who shall, so soon as he shall have settled the case, sign the same with a statement thereon that the parties have not agreed, and it shall then be sealed by the Chief Clerk. (p. 16, *ante*). Proceedings where parties disagree. Compare r. 376, *ibid*.

**RR. 162-66.** **162.** If the Judge in perusing the case, and the respondent's emendation, thinks fit, he may strike out the whole or any parts of the statements of the case and evidence by both parties, and substitute copies of his own notes of the evidence, with such remarks thereon as he may think fit. (p. 16, *ante*).

Judge may alter case.  
Compare r. 377,  
*County Court Rules* 1891.

**163.** Except as provided in the next rule, every case shall be transmitted to the proper officer of the Supreme Court, in accordance with section 9 of the *Insolvency Act* 1897, within two months from the date of the request made for transmission of the question of law to the Supreme Court. (p. 16, *ante*).

Time for transmitting case.  
Compare r. 378,  
*ibid.*

**164.** If the case should not be returned by the Judge, settled and signed, within fourteen days after he shall have received the same, then he shall endorse upon the case an enlargement of the time for transmitting the case to the proper officer of the Supreme Court of fourteen days from the day upon which he shall return the case so settled and signed to the applicant. (p. 16, *ante*).

Enlargement of time.  
Compare r. 379,  
*ibid.*

## PART II.

### PROCEEDINGS FROM ACT OF INSOLVENCY TO DISCHARGE.

#### DECLARATION OF INABILITY TO PAY DEBTS.

Form of declaration.  
Compare r. 17,  
*Insolvency Rules* 1890.

**165.** A declaration by a debtor of his inability to pay his debts shall be dated, signed, and witnessed, and shall be in the Form No. 2 in the Appendix, with such variations as circumstances may require, and shall be filed with the Chief Clerk of the Court in the district in which such debtor might present a petition for sequestration. The witness shall be a solicitor, or justice of the peace, or the Chief Clerk. (pp. 79, 117, *ante*).

#### PETITION FOR SEQUESTRATION BY DEBTOR.

Form of petition for sequestration and contents of affidavit in support.  
Compare r. 7,  
*ibid.*

**166.** Every petition for sequestration under Part III. of the Principal Act shall be in the Form No. 3 in the Appendix, with such variations as circumstances may require, and shall be attested by a solicitor or the Chief Clerk, and shall be accompanied by an affidavit of the debtor containing the following particulars :—

- (I.) Verifying the statements in the petition.
- (II.) Stating when the petitioner first became unable to pay his debts in due course as they became due, and the cause of such inability.
- (III.) What books of account he has kept, or, if he has kept none,

what documents he has (if any), and of what kind, which **RR. 166-70a.**  
will show the state of his affairs. (p. 71, *ante*).

**167.** Every petition shall be accompanied by a schedule containing **Schedule.**  
the particulars specified in Forms No. 4 of the Appendix, which shall **Compare r. 8,**  
be verified by the affidavit of the insolvent in the Form No. 4 in the **Insolvency Rules**  
**Appendix** ; and if such schedule has been prepared wholly or in part by **1890.**  
any other person or persons, by the affidavit of such other person or  
persons. (p. 72, *ante*).

**168.** The debtor shall besides inserting in the petition his name and **Description and**  
description, and his address at the date when the petition is presented, **address of**  
further describe himself as lately residing or carrying on business at the **debtor.**  
address or several addresses, as the case may be, at which he has incurred **Compare r. 144**  
debts and liabilities which at the date of the petition remain unpaid or **(1), Bankruptcy**  
unsatisfied. (pp. 72, 74, *ante*). **Rules 1886.**

**169.** The Judge or Chief Clerk may dispense with the whole or such **Particulars in**  
portion of the particulars mentioned in the said schedule as he may **Schedule may**  
think fit, but he shall not do so except upon affidavit showing sufficient **be dispensed**  
grounds. In cases of petitions for the sequestration of trust estates or **with.**  
partnership estates the same form of schedule shall be used as nearly as **Compare r. 9.**  
may be ; and as to partners, the schedule shall distinguish joint and **Insolvency Rules**  
separate estates and liabilities. (pp. 72, 74, 77, *ante*). **1890.**

#### CREDITOR'S PETITION.

**170.** (1) The rules of practice made by the Judges of the Supreme **Rules of practice**  
Court in regard to the granting of orders *nisi* for sequestration under **made by the**  
Part IV. of the Principal Act shall be followed by the Judges of the **Judges of**  
Court of Insolvency. (p. 133, *ante*). **Supreme Court**  
**in regard to**  
**rules nisi to be**  
**followed.**

(2) Office copies of an order *nisi* for compulsory sequestration made **Compare r. 12,**  
by a Judge of the Court shall be signed or certified by a Chief Clerk. **ibid.**  
(p. 135, *ante*). **Office copies**  
**order nisi.**  
**Compare s. 32,**  
**Act of 1890.**

(3) An order *nisi* made upon a creditor's petition under section 42 **Service of order**  
of the Principal Act and section 113 of the *Insolvency Act* 1897 shall **nisi upon**  
unless the Judge of the Court making the order otherwise directs be **petition under**  
served on each executor who has proved the will, or, as the case may **section 42 of the**  
be, on each person who has taken out letters of administration. The **Principal Act**  
said Judge may also if he thinks fit order the order *nisi* to be served on **and section 113**  
any other person. (p. 95, *ante*). **of the Insol-**  
**veny Act 1897.**  
**Compare r. 276,**  
**Bankruptcy**  
**Rules 1886.**

**170A.** Where the estate of a debtor has been adjudged to be seques- **Security held by**  
trated upon the petition of a secured creditor who has been admitted as **petitioning**  
**creditor.**

**RR. 170a-77.** the petitioning creditor to the extent of the balance of the debt due to him after deducting the amount estimated by the creditor as the value of his security he shall, upon the application of the trustee at any time before he has realized the security, give up the security to the trustee upon the payment to him of the value so estimated. (p. 100, *ante*).

Filing of schedule after adjudication of sequestration.

Compare r. 104, *Insolvency Rules* 1890.

Compare r. 10, *ibid*.

**171.** Within one week after adjudication of sequestration, or such further time as the Judge or Chief Clerk may allow, the insolvent shall file in the office of the Chief Clerk the schedule hereinbefore referred to, verified in manner aforesaid, and the Judge or Chief Clerk may in like manner as aforesaid dispense with any portions of the said schedule upon such terms (if any) as he may think fit, and within the said time the insolvent shall file an affidavit containing the particulars mentioned in sub-section (2) and (3) of Rule No. 166 of these Rules. (pp. 72, 146, *ante*).

Order under Part III. to be in print, manuscript, or type-written.

Compare r. 11, *ibid*.

Office copy of order of sequestration to be lodged with Registrar-General.

Compare r. 15, *ibid*.

**172.** Every order of sequestration under Part III. of the Principal Act shall be either in print or manuscript or type written, or partly in one and partly in another, on parchment or paper. (p. 72, *ante*).

**173.** The party obtaining any order of sequestration under Part III. or Part IV. of the Principal Act shall forthwith lodge an office copy thereof with the Registrar-General, who shall enter in a book to be kept by him for that purpose the name of the insolvent, his address and description, the date of the sequestration or adjudication of sequestration, and the name of the assignee or trustee named in the order, and every entry shall be numbered consecutively. (pp. 73, 134, 146, 205, *ante*).

Notice of order of sequestration to be lodged with sheriff.

Compare r. 16, *ibid*.

**174.** The party obtaining any order of sequestration under Part III. or Part IV. of the Principal Act shall also forthwith lodge an office copy thereof with the Sheriff, who shall register the same and note thereon the day and hour of its production. (pp. 73, 134, *ante*).

#### DEBTOR'S SUMMONS.

Debtor's summons.

Rules 175 to 190 —compare rr. 18 to 30, *Insolvency Rules* 1890.

Affidavit to be filed.

**175.** A debtor's summons in the Form No. 6 in the Appendix may be granted by the Court. (p. 120, *ante*).

**176.** A creditor desirous that a debtor's summons may be granted must file an affidavit of the truth of his debt, and lodge the summons, together with two copies thereof, and three copies of his particulars of demand. (p. 121, *ante*).

Particulars of demand.

**177.** The particulars of demand shall be expressed with reasonable and convenient certainty as to dates and all other matters, but no

objection shall be allowed to the particulars unless the Court shall **RR. 177-84.**  
consider that the debtor has been misled by them. (p. 122, *ante*).

**178.** The Chief Clerk shall seal such particulars, and such particulars shall then be deemed part of the summons, and the original summons shall be filed and the copies be sealed and issued to the creditor. (p. 122, *ante*). Particulars of demand to be sealed and filed.

**179.** Every debtor's summons shall be indorsed with the name and place of business of the solicitor actually suing out the same; but in case no solicitor shall be employed for the purpose then with a memorandum expressing that the same has been sued out by the creditor in person. (p. 122, *ante*). Indorsement of name on summons.

**180.** There shall be indorsed on the debtor's summons in addition to an intimation of the consequences of neglect to comply with the requisitions of the summons a notice to the debtor that if he disputes the debt and desires to obtain the dismissal of the summons he must file an affidavit with the Chief Clerk within fourteen days, stating that he is not so indebted or only so to a less amount than £50. (pp. 121, 123, *ante*). Indorsement of notice on summons.

**181.** Where a debtor files the above-mentioned affidavit the Chief Clerk shall fix the time and place at which the application for the dismissal of the summons will be heard by the Court, and give notice thereof to the creditor and debtor three days before the day so fixed. (p. 123, *ante*). Application to dismiss summons.

**182.** Where the proceedings on a debtor's summons have been stayed pending the trial of the question of the validity of the creditor's debt the creditor or debtor may after the proceedings on the trial of such question have terminated set down the summons for further order of the Court on a day to be fixed by the Chief Clerk. (p. 125, *ante*). Proceedings after trial of validity of debt.

**183.** Where proceedings on a debtor's summons have been stayed for the trial of the question of the validity of the creditor's debt, and such question has been decided against the validity of the debt, the debtor on production of an office copy of the judgment of the Court shall be entitled to have the debtor's summons dismissed, and if the Court think fit with costs, but the order for costs shall not be enforced for seven days, or where the creditor has lodged a notice showing that he has taken the necessary steps to set aside the judgment until after the final decision thereon. (p. 125, *ante*). Dismissal of summons after trial of validity of debt.

**184.** Where the proceedings on a debtor's summons have been stayed pending the trial of the question of the validity of the creditor's debt, When result of trial of validity of debt in favour of creditor

**RR. 184-89.** and such question has been decided in favour of the validity of the debt, the creditor shall be entitled to an order of the Court refusing the application of the debtor to dismiss the summons, and if the Court thinks fit with costs. (p. 125, *ante*).

Continuance of proceedings.

**185.** When proceedings on a debtor's summons are stayed upon security being given the creditor shall take or continue proceedings for the payment of the debt within 21 days from the date on which the security was completed, or if no such security was ordered or given then within 21 days from the date of the order staying proceedings on the summons, and shall prosecute the same with effect without delay, and if he fail to do so the debtor shall be entitled to have the summons dismissed with costs. (p. 125, *ante*).

Bond upon stay of proceedings.

**186.** Where proceedings on a debtor's summons are stayed upon security being given, if the debtor do not within the specified time enter into the bond to the creditor or other security required by the Court the creditor shall be entitled to an order of the Court refusing the application of the debtor to dismiss the summons with costs. (p. 124, *ante*).

Service of summons.

**187.** A debtor's summons shall be personally served within 21 days from the date of the summons by delivering to the debtor a sealed copy of the summons, but if personal service cannot be effected the Court may grant extension of the time for service, or if the Court is satisfied by affidavit or the examination of witnesses that the debtor has left Victoria, or is keeping out of the way to avoid such service, it may order service to be made by delivery of a sealed copy of the summons to some adult inmate at his usual or last known place of residence or business, or if such inmate will not receive the same, or if there be no such inmate, by affixing such copy upon some conspicuous place upon the premises, or it may order that a notice of the granting of the summons according to Form No. 8 in the Appendix be gazetted and advertised in a local paper, and that the publication of such notice in the *Gazette* and local paper shall be deemed to be service on the debtor on the seventh day after the last of such publications. (p. 122, *ante*).

Proof of service

**188.** Service of the summons shall be proved by affidavit, with a sealed copy of summons attached and filed in Court. (p. 123, *ante*).

Application to extend time for service.

**189.** An application for an extension of time for service of a debtor's summons shall be either in print or manuscript or type written, or partly in one and partly in another, and need not be supported by affidavit unless in any case the Court shall otherwise require. (p. 122, *ante*).



**190.** When, upon a petition under Part IV. of the Principal Act, the act of insolvency relied on is that the debtor has neglected to pay, secure, or compound with the petitioner a sum mentioned in a debtor's summons, no order shall be made if the debtor has applied for the dismissal of such summons until after the hearing of the application, or where the summons has been dismissed, or during a stay of the proceedings thereon. (p. 120, *ante*).

**RR. 190-95.**

When order not to be made.

#### EXAMINATION OF INSOLVENT.

**191.** The trustee may at any time before the granting to the insolvent of an absolute certificate of discharge, and shall, on the request in writing of one-fourth of the creditors in number and value who have proved, or when thereunto directed by the Court, apply to the Court to appoint a day and hour for holding an examination sitting of the Court under section 134 of the Principal Act, and upon such application being made the Court shall by an order appoint the day and hour for such examination, and shall order the debtor to attend the Court upon such day and at such hour. (p. 355, *ante*).

Trustee may apply to Court for examination sitting and shall &c.

Compare r. 184, *Bankruptcy Rules 1886*.

**192.** If the debtor fails to attend the examination at the time and place appointed by any order for holding or proceeding with the same, and no good cause is shown by him for such failure, it shall be lawful for the Court, upon its being proved to the satisfaction of the Court that the order requiring the debtor to attend the examination was duly served, and without any further notice, to commit him to prison, as provided by section 135 of the Principal Act, or to make such other order as the Court shall think fit. (p. 357, *ante*).

Failure of debtor to attend examination.

Compare r. 185, *ibid*.

**193.** Where any order is made appointing the time and place for holding an examination sitting of the Court, the trustee shall, seven days before the day appointed for the examination, serve a copy thereof on the insolvent, and shall advertise in a local paper and send to the creditors notice of such order and of the time and place appointed thereby.

Service of order appointing time for examination meeting.

Compare r. 186, *ibid*, and *vide s. 111 (2) Act of 1897*.

**194.** The trustee shall, when thereunto directed by the Court or on the request in writing of one fourth of the creditors in number and value who have proved, summon before the Court any person liable to be summoned under section 135 of the Principal Act.

Trustee when required shall summon persons under section 135 of the Principal Act.

**195.** The notes taken of a debtor's examination in pursuance of section 134 or 135 of the Principal Act shall be read over to or by the debtor and be then signed by him at the foot of each page. (pp. 356, 358, 359, *ante*).

Notes of examination to be read to or by debtor and be signed by him.

**RR. 198-201. APPLICATIONS UNDER SECTIONS 131 AND 132 OF THE PRINCIPAL ACT.**

Applications  
under sections  
131 and 132.

**196.** (1) An insolvent intending to apply for a release of his estate from sequestration under section 131 or 132 of the Principal Act shall make his application to the Court, in writing, in the Form No. 55 in the Appendix, with such variations as circumstances may require, and thereupon the Court shall appoint a day for hearing the application in open Court. (p. 405, *ante*).

Compare r. 133,  
*Insolvency Rules*  
1890.

(2) Notice of any application under section 131 or 132 of the Principal Act shall be in the form No. 55A in the Appendix, and shall be served upon the trustee and Official Accountant and upon every creditor of the insolvent, whether such creditor has proved or not, 30 days before the day appointed for hearing such application. If any creditor be dead, service upon his personal representative shall be sufficient, or if any creditor be absent from Victoria, service upon his agent shall be sufficient; but the Court may dispense with service if there be no representative or agent in Victoria of such deceased or absent person. (p. 194, 405, *ante*).

Opposition to  
application.  
Compare *ibid*.

**197.** Any creditor who has proved his claim or the Official Accountant or trustee may without notice to the insolvent be heard upon any such application in opposition to or support thereof as the case may be. (pp. 194, 407, *ante*).

Form of order.

**198.** An order of the Court releasing the estate of any insolvent from sequestration shall be in the Forms Nos. 56 or 57 in the Appendix, with such variations as circumstances may require. (p. 407, *ante*).

Court to hear  
report of  
trustee.

**199.** (1) On any motion for the release of an estate from sequestration, it shall be the duty of the trustee to report to the Court, in writing, that he has investigated the matter, and to state whether the requirements of the section have been complied with. (p. 407, *ante*).

(2) Such report shall be filed not less than four days before the time fixed for hearing the application.

Court to refuse  
order if offer  
not reasonable  
&c.

**200.** No order for the release of an estate from sequestration shall be made unless the Court is duly satisfied that provision is made for payment of all proper costs, charges, and expenses of, and incidental to, the insolvency. (pp. 406, 407, *ante*).

Or if certificate  
would be  
suspended or  
granted  
conditionally.

**201.** If any facts are proved, on proof of which the Court would be required to refuse dispensation under section 139 of the Principal Act, the Court shall refuse to make an order releasing the debtor's estate from sequestration under section 131 of the Principal Act, unless the

offer provides reasonable security for payment of not less than 7s. in the £1 on all the unsecured debts provable against the insolvent's estate. (p. 407, *ante*). RR. 201-10.

**202.** In any other case the Court may either make or refuse to make an order releasing the insolvent's estate from sequestration. (p. 407, *ante*). Other cases.

**203.** The Court, on any application for an order releasing the estate of an insolvent from sequestration, may, if it shall think fit, direct that the amount payable to any creditor who has not received the composition shall be secured in such manner as the Court shall direct. (p. 407, *ante*). Amount payable to a creditor who has not received same to be secured.

#### PROOF OF DEBT.

**204.** Every creditor shall prove his debt as soon as may be after the making of the order of sequestration. (p. 271, *ante*). Creditor to prove.  
Compare Second Schedule (1),  
Bankruptcy Act 1883.

**205.** A debt may be proved at any duly summoned meeting of creditors, or at any time before the meeting, by delivering or sending through the post in a prepaid letter, before the appointment of a trustee, to the assignee, and, after the appointment of a trustee to such, an affidavit verifying the debt. (p. 272, *ante*). How to be proved.  
Compare *ibid* (2).

**206.** The affidavit shall be in the Form No. 75 in the Appendix, with such variations as circumstances may require, and shall contain an address of the creditor or his solicitor at which notices may be served, and service of notices at such address, except herein otherwise provided, shall be sufficient. (p. 272, *ante*). Form and contents of affidavit.

**207.** The affidavit may be made by the creditor himself or by some person authorized by or on behalf of the creditor. If made by a person so authorized, it shall state his authority and means of knowledge. (p. 273, *ante*). By whom affidavit may be made.  
Compare *ibid* (3).

**208.** A corporation or other body incorporated or authorized to sue may prove their debt by an agent duly authorized under the seal of the corporation. (p. 273, *ante*). Proof of debt due to a corporation.

**209.** The affidavit shall contain or refer to a statement of accounts showing the particulars of the debt, and shall specify the vouchers (if any) by which the same can be substantiated. The trustee may at any time call for the production of the vouchers. (p. 273, *ante*). Statement of account to be contained or referred to in affidavit.  
Compare *ibid* (4).

**210.** The affidavit shall state whether the creditor is or is not a secured creditor. (p. 272, *ante*). Statement that creditor secured or unsecured.  
Compare *ibid* (5).

- RR. 211-17.** **211.** The affidavit of proof may be sworn before any Commissioner of the Supreme Court for taking Affidavits, not being the solicitor or clerk of the solicitor of the deponent. (p. 273, *ante*).
- Before whom to be sworn.
- Costs of proof.** **212.** A creditor shall bear the cost of proving his debt, unless the Court otherwise specially orders. (pp. 68, 276, *ante*).
- Compare Second Schedule (6), *Bankruptcy Act* 1883.
- Inspection of proofs.** **213.** Every creditor who has lodged a proof shall be entitled to see and examine the proofs of other creditors before the first general meeting of creditors under section 53 of the Principal Act, and at all reasonable times. (p. 276, *ante*).
- Compare *ibid* (7).
- Trade discounts to be deducted.** **214.** A creditor proving his debt shall deduct therefrom all trade discounts, but he shall not be compelled to deduct any discount which he may have agreed to allow for payment in cash. (p. 273, *ante*).
- Compare *ibid* (8).
- Proof by secured creditor realizing his security.** **215.** If a secured creditor realizes his security, he may prove for the balance due to him after deducting the net amount realized. (p. 308, *ante*).
- Compare *ibid* (9).
- On surrender of security.** **216.** If a secured creditor surrenders his security to the trustee for the general benefit of the creditors, he may prove for his whole debt. (p. 308, *ante*).
- Compare *ibid* (10).
- If creditor neither realizes or surrenders his security.** **217.** If a secured creditor does not either realize or surrender his security he shall before ranking for dividend state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed. (pp. 292, 309, *ante*).
- Compare *ibid* (11).
- Trustee may redeem security.** (a) Where a security is so valued, the trustee or assignee, as the case may be, may at any time redeem it on payment to the creditor of the assessed value. (pp. 310, 318, *ante*).
- Compare *ibid* (12).
- If trustee dissatisfied with assessment.** (b) If the trustee is dissatisfied with the value at which a security is assessed he may require that the property comprised in any security so valued be offered for sale at such times and on such terms and conditions as may be agreed on between the creditor and the trustee, or as in default of such agreement the Court may direct. If the sale be by public auction the creditor or the trustee on behalf of the estate may bid or purchase. (p. 310, *ante*).
- Election by trustee to redeem.** (c) Provided that the creditor may at any time by notice in writing require the trustee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realized, and if the trustee does not within six months after

receiving the notice signify, in writing, to the creditor his election to exercise the power he shall not be entitled to exercise it, and the equity of redemption or any other interest in the property comprised in the security which is vested in the trustee shall vest in the creditor, and the amount of his debt shall be reduced by the amount at which the security has been valued. (p. 310, *ante*). **RR. 217-24.**

**218.** Where a creditor has so valued his security but has not voted or received a dividend, he may at any time amend the valuation and proof on showing to the satisfaction of the trustee or the Court that the valuation and proof were made *bond fide* on a mistaken estimate; but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court shall order, unless the trustee shall allow the amendment without application to the Court. (p. 310, *ante*). Amending assessment. Compare Second Schedule (13), Bankruptcy Act 1883

**219.** Any secured creditor so proving shall be bound to pay over to the assignee or trustee, as the case may be, the amount which his security shall produce beyond the amount of such assessed value or amended valuation. (p. 310, *ante*). Security assessed below what it may produce. Compare r. 84, Insolvency Rules 1890.

**220.** The proof of any such creditor shall not be increased in the event of the security realizing a less sum than the value at which he has so assessed the same. (p. 310, *ante*). Security assessed above what it realizes. Compare r. 85, *ibid*.

**221.** If a secured creditor does not comply with the foregoing rules, he shall be excluded from all share in any dividend. (p. 311, *ante*). Non-compliance with rules by secured creditor. Compare Second Schedule (16), Bankruptcy Act 1883.

**222.** Subject to the provisions of Rule 217 (a) a creditor shall in no case receive more than 20s. in the £1, and interest as provided by the Acts. (p. 318, *ante*). A creditor not to receive more than 20s. in the £1. Compare (17) *ibid*.

**223.** If a debtor was at the date of the order of sequestration liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor, and also as a member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of the contracts against the properties respectively liable on the contracts. (p. 300, *ante*). Proof in respect of distinct contracts. Compare s. 119, Act of 1890, and Second Schedule (18) Bankruptcy Act 1883.

**224.** When any rent or other payment falls due at stated periods, and the order of sequestration is made at any time other than one of those periods, the person entitled to the rent or payment may prove for a proportionate part thereof, up to the date of the order, as if the rent or payment grew due from day to day. Periodical payments. Compare Second Schedule (19), Bankruptcy Act 1883.

**RR. 225-30.**

Workmen's  
wages.

Compare r. 220,  
*Bankruptcy  
Rules 1890.*

**225.** In any case in which it shall appear from the debtor's schedule or statement of affairs that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor or his foreman, or some other person on behalf of all such creditors. Such proof shall be in the Form No. 76 in the Appendix, and shall have annexed thereto, as forming part thereof, a schedule setting forth the names of the workmen and others, and the amounts severally due to them. Any proof made in compliance with this rule shall have the same effect as if separate proofs had been made by each of the said workmen and others. (p. 287, *ante*).

Production of  
bills of exchange  
and promissory  
notes.

Compare r. 221,  
*ibid.*

**226.** Where a creditor seeks to prove in respect of a bill of exchange, promissory note, or other negotiable instrument or security on which the debtor is liable, such bill of exchange, note, instrument, or security must, subject to any special order of the Court made to the contrary, be produced to the assignee, chairman of a meeting, or trustee, as the case may be, before the proof can be admitted either for voting or for dividend. (pp. 161, 294, *ante*).

Time for lodging  
proofs.

Compare r. 222,  
*ibid.*

**227.** A proof intended to be used at the general meeting of creditors to be held under section 53 of the Principal Act shall be lodged with the assignee not later than 24 hours before the time fixed for holding such meeting. (p. 273, *ante*).

Lodging proofs  
where first  
meeting  
adjourned.

Compare r. 40,  
*Bankruptcy  
Rules 1890.*

**228.** A proof intended to be used at an adjournment of the first meeting (if not lodged in time for the first meeting) must be lodged not less than 24 hours before the time fixed for holding the adjourned meeting. (p. 273, *ante*).

Transmission of  
proofs to  
trustee.

Compare r. 223,  
*Bankruptcy  
Rules 1890.*

**229.** Where a trustee is appointed in any matter all proofs of debts that have been received by the assignee shall be handed over to the trustee; but the assignee shall first make a list of such proofs, and take a receipt thereon from the trustee for such proofs. (p. 273, *ante*).

Time for  
admission or  
rejection of  
proof by trustee.  
Compare r. 228,  
*ibid.*

**230.** The trustee shall examine every proof and the grounds of the debt, and, subject to the power of the Court to extend the time, shall within 28 days after receiving a proof, in writing, either admit or reject it wholly or in part, or require further evidence in support thereof. Provided that where the trustee has given notice of his intention to declare a dividend, he shall, within seven days after the day mentioned in such notice as the latest date up to which proofs must be lodged examine and, in writing, admit or reject every proof which has not been already admitted or rejected. If he rejects a proof he shall state, in writing, to the creditor the grounds of the rejection. (p. 274, *ante*).

**231.** Where a creditor's proof has been admitted, the notice of **RR. 231-39.**  
dividend shall be sufficient notification to such creditor of such admis-  
sion. (p. 275, *ante*).

**232.** The trustee shall, within seven days after allowing or disallow-  
ing a proof, file such proof with the Chief Clerk with a memorandum  
thereon of his allowance or disallowance thereof. (p. 275, *ante*).

**233.** If the trustee thinks that a proof has been improperly admitted  
the Court may, on the application of the trustee after notice to the  
creditor who made the proof, expunge the proof or reduce its amount.  
(p. 276, *ante*).

**234.** If a creditor is dissatisfied with the decision of the trustee in  
respect of a proof, the Court may, on the application of the creditor,  
reverse or vary the decision. (p. 275, *ante*).

**235.** The Court may also expunge or reduce a proof of debt upon the  
application of a creditor or the debtor if the trustee declines to interfere  
in the matter. (p. 276, *ante*).

**236.** For the purpose of any of his duties in relation to proofs, the  
trustee may administer oaths and take affidavits. (p. 276, *ante*).

**237.** Whenever the trustee shall reject the claim or proof of any  
creditor he shall be entitled to exclude from dividend any such claimant  
or creditor whose debt he so rejects, unless such creditor shall within 14  
days from the time at which the trustee's notice rejecting the claim or  
proof should have been delivered him in the ordinary course of post, or  
within such further time as the Court may allow, apply to the Court to  
admit his proof and proceed with such application with due diligence.  
(p. 275, *ante*).

**238.** Any separate creditor of any insolvent shall be at liberty to  
prove his debt under any sequestration made against such insolvent  
jointly with any other person or persons. (p. 300, *ante*).

**239.** On any debt or sum certain, payable at a certain time or other-  
wise, whereupon interest is not reserved or agreed for, and which is  
overdue at the date of the order of sequestration and provable in insol-  
vency, the creditor may prove for interest at a rate not exceeding Six  
pounds per centum per annum to the date of the said order from the  
time when the debt or sum was payable, if the debt or sum is payable  
by virtue of a written instrument at a certain time, or if payable other-  
wise, then from the time when a demand, in writing, has been made  
giving the debtor notice that interest will be claimed from the date of  
the demand until the time of payment. (p. 274, *ante*).

Notice of  
admission of  
proofs.  
Compare r. 229,  
*Bankruptcy  
Rules 1886*.  
Proof to be filed.  
Compare r. 80,  
*Insolvency Rules  
1890*.  
Trustee may  
apply to  
expunge or  
reduce admitted  
proof.  
Compare Second  
Schedule (23),  
*Bankruptcy  
Act 1883*.  
Application to  
reverse, &c.  
decision of  
trustee.  
Compare *ibid*  
(24).  
Court may deal  
with proof on  
application of  
creditor or  
debtor.  
Compare *ibid*  
(25).  
Trustee may  
administer oaths  
and take  
affidavits.  
Compare *ibid*  
(26).  
If appeal against  
trustee's  
decision not  
made within 14  
days creditor to  
be excluded  
from dividend.  
Compare rr. 230  
and 232 (2),  
*Bankruptcy  
Rules 1886*.

Separate  
creditor may  
prove jointly.  
Compare r. 87  
*Insolvency Rules  
1890*.  
Interest on  
debts.  
Compare Second  
Schedule (20)  
*Bankruptcy Act  
1883*.

**RR. 240-41.**

Debts not payable at sequestration may be proved. Compare Second Schedule (21), *Bankruptcy Act 1883*.

**240.** A creditor may prove for a debt not payable at the date of sequestration as if it were payable presently, and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of Six pounds per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted. (p. 274, *ante*).

**DIVIDENDS.**

Notice of intended dividend.

Rules 241 to 243 —compare rr. 232 to 234, *Bankruptcy Rules 1886*.

**241.** (1) Not more than two months before declaring a dividend the trustee shall cause notice of his intention to do so to be advertised in the *Government Gazette* and in one of the Melbourne daily newspapers and also in some local newspaper where the debtor last carried on business or resided previous to sequestration, if not in Melbourne, and shall also send reasonable notice thereof, in writing, to such of the creditors mentioned in the debtor's schedule or statement of affairs or otherwise known to the trustee as have not proved their debts. Such notice shall specify the latest date up to which proofs must be lodged, which shall be not less than fourteen days from the date of such notice. (p. 319, *ante*).

(2) Where any creditor, after the date mentioned in the notice of intention to declare a dividend as the latest date upon which proofs may be lodged, appeals against the decision of the trustee rejecting a proof, such appeal shall, subject to the power of the Court to extend the time in special cases, be commenced, and notice thereof given to the trustee within fourteen days from the date of the notice of the decision against which the appeal is made, and the trustee shall in such case make provision for the dividend upon such proof, and the probable costs of such appeal in the event of the proof being admitted. Where no appeal has been commenced within the time specified in this Rule the trustee shall exclude all proofs which have been rejected from participation in the dividend. (pp. 275, 319, *ante*).

(3) Immediately after the expiration of the time fixed by this Rule for appealing against the decision of the trustee, he shall proceed to declare a dividend, and shall send a notice of dividend to each creditor whose proof has been admitted, accompanied by a statement, according to Form No. 93 in the Appendix, showing the position of the estate. (p. 319, *ante*).

Forms Nos. 91, 92, and 96.

(4) The notices shall be in the Forms Nos. 91, 92, and 96 in the Appendix, with such variations as circumstances may require. (p. 319, *ante*).



(5) If it becomes necessary, in the opinion of the trustee and committee of inspection (if any), to postpone the declaration of the dividend beyond the prescribed limits of two months, the trustee shall cause a fresh notice of his intention to declare a dividend to be advertised in the *Government Gazette*, and in one of the Melbourne daily newspapers and also in some local newspaper where the debtor last carried on business or resided previous to sequestration, if not in Melbourne, but it shall not be necessary for such trustee to give a fresh notice to such of the creditors mentioned in the debtor's schedule or statement of affairs as have not proved their debts. In all other respects the same procedure shall follow the fresh notice as would have followed the original notice. (pp. 198, 321, *ante*).

RR. 241-48.

Postponement of dividend.

**242.** Subject to the provisions of section 71 of the *Instruments Act* 1890, and subject to the power of the Court in any other case on special grounds to order production to be dispensed with, every bill of exchange, promissory note, or other negotiable instrument or security, upon which proof has been made, shall be exhibited to the trustee before payment of dividend thereon, and the amount of dividend paid shall be indorsed on the instrument. (pp. 294, 321, *ante*).

Production of bills, notes, &c.

**243.** The amount of the dividend may at the request and risk of the creditor be transmitted to him by post. (p. 321, *ante*).

Dividend may be sent by post.

**244.** Prior to the declaration of a dividend the trustee shall prepare a list of all proofs admitted. The list must be in the Form No. 94 or 95 in the Appendix, and must be transmitted to the Chief Clerk. (p. 320, *ante*).

Dividends.

**245.** The payment of dividends will in every instance, except where a local bank has been selected by the creditors, be made by cheques on the insolvency estates account. The creditors in the list are to be numbered consecutively, and corresponding numbers affixed to the cheques. (p. 320, *ante*).

Payment of dividends.

**246.** The total amount of the dividend payable shall be charged in the estate cash-book in one sum. (p. 320, *ante*).

**247.** If the dividend has been paid by cheques on the insolvency estates account, the trustee, on the expiration of six months from the date of issue, or on application for his release, if that event occurs earlier, shall forward to the Official Accountant any cheques remaining in hand. (pp. 193, 320, *ante*).

**248.** If the dividend has been paid through a local bank, the trustee shall, at the expiry of six months from the date of the declaration of a

**RR. 248-54.** dividend, forward to the Official Accountant for audit vouchers for the dividends paid and a list of those remaining unclaimed, and shall within 48 hours thereafter pay into the insolvency unclaimed dividend fund the amount of the dividends unclaimed. Under no circumstances are unclaimed dividends to be credited to the estate. (pp. 192, 320, *ante*).

Notice of final dividend.

**249.** Notice of intention to declare a final dividend shall be in the Form No. 97 in the Appendix. (p. 321, *ante*).

#### PROXIES.

Form and filing of proxies.  
Rules 250 to 253  
—compare rules  
245 to 248,  
*Bankruptcy*  
*Rules 1898.*

**250.** (1) A general proxy shall be in the Form No. 78 ; a special proxy shall be in the Form No. 79 in the Appendix.

(2) A proxy shall be lodged with the assignee, or, as the case may be, the trustee not later than four o'clock on the day before the meeting or adjourned meeting at which it is to be used. (p. 160, *ante*).

(3) As soon as a proxy has been used it shall be filed with the proceedings in the matter. (p. 160, *ante*).

Signature of proxy.

**251.** A proxy given by a creditor shall be deemed to be sufficiently executed if it is signed by any person in the employ of the creditor having a general authority to sign for such creditor, or by the authorized agent of such creditor if resident abroad ; such authority shall be in writing. (p. 159, *ante*).

Filling in when creditor blind, &c.

**252.** The proxy of a creditor blind or incapable of writing may be accepted if such creditor has attached his signature or mark thereto in the presence of a witness, who shall add to his signature his description and residence ; and provided that all insertions in the proxy are in the handwriting of the witness, and such witness shall have certified at the foot of the proxy that all such insertions have been made by him at the request of the creditor and in his presence before he attached his signature or mark. (p. 160, *ante*).

Minors not to be proxies.

**253.** No person shall be appointed a general or special proxy who is a minor. (p. 158, *ante*).

#### MEETINGS OF CREDITORS.

First meeting of creditors under section 53 of the Principal Act.  
Compare First Schedule (1), *Bankruptcy Act 1898.*

**254.** The general meeting of creditors, to be held under section 53 of the Principal Act, shall be summoned for a day not later than fourteen days after the date of the order for sequestration, unless the Court for any special reason deem it expedient that the meeting be summoned for a later day. (p. 154, *ante*).

**255.** (1) The Chief Clerk shall summon the meeting by giving not less than seven days' notice of the time and place thereof in the *Government Gazette*, and in one of the Melbourne daily newspapers, and also in some local newspaper if the proceedings are not being prosecuted in Melbourne. (p. 154, *ante*).

**RR. 255-63.**  
Chief Clerk to summon.  
Compare First Schedule (2), *Bankruptcy Act* 1883.

**256.** The assignee shall also, as soon as practicable, send to the Official Accountant and each creditor mentioned in the debtor's schedule, a notice in the Form No. 41 of the Appendix, with such variations as circumstances may require of the time and place of the meeting, but the proceedings at such meeting shall not be invalidated by reason of any such notice not having been sent or received before the meeting. (pp. 154, 190, *ante*).

Assignee to send notice thereof to Official Accountant and creditors.  
Compare *ibid* (3).

**257.** The Chief Clerk shall fix the time and place for the meeting, and shall be the chairman thereat. (p. 154, *ante*).

Chief Clerk to fix day.  
Compare rr. 90 and 93, *Insolvency Rules* 1890.

**258.** The Chief Clerk may adjourn the meeting from time to time until any disputed proof is finally rejected or admitted. (p. 154, *ante*).

Adjournment of meeting.

**259.** The assignee, or if he cannot conveniently, some other person authorized by writing under his hand shall attend the meeting and produce the proofs of debt delivered to or sent to him. (p. 154, *ante*).

Compare r. 91, *ibid*.  
Assignee to attend meeting.  
Compare r. 93, *ibid*.

**260.** The trustee may at any time summon a general meeting of creditors, and shall do so whenever so directed by the Court, or so requested by a resolution of creditors, or so requested in writing by one-sixth of the creditors in number and value who have proved. (p. 155, *ante*).

The trustee may summon meeting of creditors.  
Compare First Schedule (5), *Bankruptcy Act* 1883.

**261.** Meetings subsequent to the meeting under section 53 of the Principal Act, shall be summoned by sending notice in the Form No. 82 in the Appendix, with such variation as circumstances may require of the time and place thereof to each creditor at the address given in his proof, and, if he has not proved, at the address given in the debtor's schedule or statement of affairs, or at such other address as may be known to the person summoning the meeting; where no special time is prescribed the notices shall be sent off not less than three days before the day appointed for the meeting. (p. 155, *ante*).

Subsequent meetings, how summoned.  
Compare *ibid* (6).

**262.** The chairman at meetings subsequent to the meeting under section 53 of the Principal Act shall be such person as the meeting by resolution appoints. (p. 156, *ante*).

Chairman.  
Compare *ibid* (7).

**263.** Where a meeting of creditors is called by notice the proceedings had and resolutions passed at such meeting shall, unless the Court otherwise orders, be valid, notwithstanding that some creditors shall not have received the notice sent to them. (p. 155, *ante*).

Non-reception of notice by creditor.  
Compare r. 252, *Bankruptcy Rules* 1886.

**RR. 264-71.**

Proof of notice.  
Compare r. 253,  
*Bankruptcy*  
*Rules 1886.*

**264.** An affidavit by the trustee or his solicitor, or the clerk of either of such persons, that the notice of any meeting of creditors or sitting of the Court has been duly posted, shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed. The affidavit shall be in the Form No. 83 in the Appendix with such variations as circumstances may require.

Cost of creditors' meetings.

Compare r. 254,  
*Bankruptcy*  
*Rules 1886.*

**265.** The costs of summoning a meeting of creditors, at the instance of any person other than the assignee or trustee, shall be paid by the person at whose instance it was summoned, to be repaid to him out of the estate, if the creditors or the Court shall so direct. (p. 155, *ante*).

Adjournment of meetings.

**266.** Meetings of creditors may be adjourned from time to time, as the creditors by an ordinary resolution may direct. (p. 156, *ante*).

Place and time of adjourned meeting.

Compare r. 256,  
*Bankruptcy*  
*Rules 1886.*

**267.** Where a meeting of creditors is adjourned, the adjourned meeting shall be held at the same place as the original place of meeting, unless in the resolution for adjournment another place is specified. (p. 156, *ante*).

Ordinary resolution.

Compare r. 98,  
*Insolvency Rules*  
*1890.*

**268.** (1) Directions of creditors at a meeting shall, except whereby the acts or these Rules otherwise required, be given by an ordinary resolution. (p. 156, *ante*).

Copy of resolution for Chief Clerk.

Compare *ibid*.

(2) The trustee shall send to the Chief Clerk a copy certified by him of every resolution of a meeting of creditors, except the meeting under section 53 of the Principal Act.

Meeting of creditors.

Compare First  
Schedule (8),  
*Bankruptcy Act*  
*1883.*

**269.** A person shall not be entitled to vote as a creditor at the meeting held under section 53 of the Principal Act, or at any other meeting of creditors, unless he has duly proved a debt, provable in insolvency, to be due to him from the debtor, and the proof has been duly lodged within the time prescribed. (p. 160, *ante*).

Voting by secured creditor.

Compare *ibid*  
(10).

**270.** For the purpose of voting a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the Court, on application, is satisfied that the omission to value the security has arisen from inadvertence. (pp. 161, 308, *ante*).

Vote on debt secured by current bill or note.

Compare *ibid*  
(11).

**271.** A creditor shall not vote in respect of any debt on or secured by a current bill of exchange or promissory note held by him, unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the debtor, and against whom an order

for sequestration in insolvency has not been made, and whose affairs are not being liquidated by arrangement, and who has not made a statutory composition with his creditors as a security in his hands, and to estimate the value thereof, and for the purposes of voting, but not for the purposes of dividend, to deduct it from his proof. (p. 161, *ante*). **RR. 271-79.**

**272.** If an order of sequestration is made against one partner of a firm any creditor to whom that partner is indebted, jointly with the other partners of the firm or any of them, may prove his debt for the purpose of voting at any meeting of creditors, and shall be entitled to vote thereat. (p. 162, *ante*). Proof of partnership debt against insolvent of a firm.  
Compare First Schedule (13),  
Bankruptcy Act 1883.

**273.** The chairman of a meeting shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the Court. If he is in doubt whether the proof of a creditor should be admitted or rejected he shall mark the proof as objected to, and shall allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained. (p. 162, *ante*). Chairman may admit or reject a proof for purpose of voting.  
Compare *ibid* (14).

**274.** A creditor may vote either in person or by proxy. (p. 158, *ante*). Voting.

**275.** A creditor may give a general proxy to his manager or clerk, or any other person in his regular employment. In such case the instrument of proxy shall state the relation in which the person to act thereunder stands to the creditor. (p. 158, *ante*). Compare *ibid* (15).  
General proxy.  
Compare *ibid* (17).

**276.** A proxy shall not be used unless it is deposited with the assignee or trustee, as the case may be, not later than Four o'clock on the day before the meeting at which it is to be used. (p. 160, *ante*). Deposit of proxy with assignee.  
Compare *ibid* (19).

**277.** Where it appears to the satisfaction of the Court that any solicitation has been used by or on behalf of a trustee in obtaining proxies or in procuring the trusteeship, except by the direction of a meeting of creditors, the Court shall have power, if it think fit, to order that no remuneration shall be allowed to the person by whom or on whose behalf such solicitation may have been exercised, notwithstanding any resolution of the committee of inspection or of the creditors to the contrary. (p. 24, *ante*). Solicitation by trustee.  
Compare *ibid* (20).

**278.** The chairman of a meeting may, with the consent of the meeting, adjourn the meeting from time to time and from place to place. (p. 156, *ante*). Chairman may adjourn meeting.  
Compare *ibid* (22).

**279.** A meeting of creditors shall not be competent to act for any purpose except the election of a chairman, the proving of debts, and the adjournment of the meeting, unless there are present or represented What meeting may do if no quorum.  
Compare *ibid* (23).

**RR. 279-85.** thereat at least three, or all the creditors if their number does not exceed three. (p. 156, *ante*).

Quorum.

Compare r. 257,  
*Bankruptcy*  
*Rules 1896.*

**280.** In calculating a quorum of creditors present at a meeting, those persons only who are entitled to vote at the meeting shall be reckoned (p. 156, *ante*).

Adjournment of  
meeting if no  
quorum.

Compare First  
Schedule (24),  
*Bankruptcy Act*  
1883.

**281.** If within half-an-hour from the time appointed for the meeting other than the general meeting under section 53 of the Principal Act a quorum of creditors is not present or represented, the meeting shall be adjourned to the same day in the following week at the same time and place, or to such other day as the chairman may appoint, not being less than seven or more than 21 days. (p. 156, *ante*).

Minutes of  
meeting.

Compare *ibid*  
(25).

**282.** The chairman of every meeting shall cause minutes of the proceedings at the meeting to be drawn up and fairly entered in a book kept for that purpose, and the minutes shall be signed by him or by the chairman of the next ensuing meeting. (p. 156, *ante*).

Proxy having  
an interest  
incompetent to  
vote.

Compare *ibid*  
(26).

**283.** No person acting either under a general or special proxy shall vote in favour of any resolution which would directly or indirectly place himself, his partner, or employer in a position to receive any remuneration out of the estate of the debtor, otherwise than as a creditor rateably with the other creditors of the debtor. Provided that where any person holds special proxies to vote for the appointment of himself as trustee he may use the said proxies and vote accordingly. (p. 159, *ante*).

#### PROCEEDINGS BY COMPANY OR CO-PARTNERSHIP.

Public officer or  
agent of com-  
pany, &c.

Compare r. 258,  
*Bankruptcy*  
*Rules 1896.*

**284.** A petition under Part III. or IV. of the Principal Act, or a debtor's summons against any debtor to any company or co-partnership duly authorized to sue and be sued in the name of a public officer, or agent of such company or co-partnership, may be presented by or sued out by such public officer or agent as the nominal petitioner for and on behalf of such company or co-partnership, on such public officer or agent filing an affidavit stating that he is such public officer or agent, and that he is authorized to present or sue out such petition or debtor's summons. Where a corporate body is petitioner or plaintiff, any affidavit in support of such petition or debtor's summons may be made by a director or other officer on its behalf. (pp. 85, 87, 104, 121, *ante*.)

#### PROCEEDINGS BY OR AGAINST FIRM.

Attestation of  
firm signature.

Compare r. 259,  
*ibid*.

**285.** Where any notice, declaration, petition, or other document requiring attestation is signed by a firm of creditors or debtors in the firm name, the partner signing for the firm shall add also to his own

signature, *e.g.*, "Brown and Co., by James Green, a partner in the said firm." (pp. 31, 74, 103, *ante*). **RR. 285-90.**

**286.** Any notice, petition, or debtor's summons for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm in Victoria on any one of the partners, or upon any person having, at the time of service, the control or management of the partnership business there. (pp. 42, 122, *ante*). Service on firm. Compare r. 280, Bankruptcy Rules 1896.

**287.** Where a firm of debtors file a declaration of inability to pay their debts, or petition under Part III. of the Principal Act, the same shall contain the names in full of the individual partners, and if such declaration or petition is signed in the firm name the declaration or petition shall be accompanied by an affidavit, made by the partner who signs the declaration or petition, showing that all the partners or the greater number of partners within Victoria concur in the filing of the the same. (pp. 74, 80, 118, *ante*). Debtor's petition by firm. Compare r. 261, *ibid*.

**288.** An order of sequestration under Parts III. or IV. of the Principal Act, made against a firm, shall operate as if it were an order made against each of the persons who at the date of the order is a partner in that firm. (pp. 76, 93, *ante*). Adjudication against firm. Compare r. 262, *ibid*.

#### JOINT AND SEPARATE ESTATES.

**289.** (1) Where the estate of a firm is sequestrated, or adjudged to be sequestrated, the joint and separate creditors shall collectively be convened to the general meeting of creditors under section 53 of the Principal Act. (pp. 154, 157, 162, *ante*). Meeting under section 53 of the Principal Act. Compare r. 265, *ibid*.

(2) On the sequestration, or adjudication of sequestration, of a partnership the person appointed trustee under section 53 (1), or section 64 (2), of the Principal Act to fill the office of trustee of the joint estate shall be the trustee of the separate estates. Each set of separate creditors may appoint its own committee of inspection; but if any set of separate creditors do not appoint a separate committee, the committee (if any) appointed by the joint creditors shall be deemed to have been appointed also by such separate creditors. (p. 202, *ante*). Adjudication. Trustee of joint estate to be trustee of separate estates. Compare r. 268, *ibid*.

**290.** If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last-mentioned firm shall be deemed to be a separate set of creditors, and to be on the same footing as the separate creditors of any individual member of the firm. And where any surplus shall arise upon the administration of the assets of such separate or independent firm, the same shall be carried Separate firms. Compare r. 269, *ibid*.

**RR. 290-94.** over to the separate estates of the partners in such separate and independent firm according to their respective rights therein. (p. 329, *ante*).

Apportionment of trustee's remuneration.

Compare r. 270, *Bankruptcy Rules* 1886.

**291.** (1) Where joint and separate estates are being administered the remuneration of the trustee in respect of the administration of the joint estate may be fixed by the creditors, or (if duly authorized) by the committee of inspection of such joint estate, and the remuneration of the trustee in respect of the administration of any separate estate may be fixed by the creditors or (if duly authorized) by the committee of inspection of such separate estate. (p. 63, *ante*).

Property of partners to vest in same trustee. Compare s. 112, *Bankruptcy Act* 1883.

(2) Where the estate of one member of a partnership has been sequestrated or adjudged to be sequestrated, and subsequently the estate of another member of the same partnership is sequestrated or adjudged to be sequestrated, the proceedings in such last-mentioned sequestration shall be prosecuted in or transferred to the Court of the district in which proceedings under the first-mentioned sequestration are in course of prosecution, and, unless the Court otherwise directs the same trustee shall be appointed as may have been appointed in respect of the property of the first-mentioned member of the partnership, and the Court may give such directions for consolidating the proceedings under the sequestrations as it thinks just. (p. 203, *ante*).

#### LUNATICS.

Lunatics.

Compare r. 271, *Bankruptcy Rules* 1886.

**292.** Where any debtor, or creditor, or insolvent is a lunatic, not so found by inquisition, or declared, the Court may appoint such person as the Court shall think fit to do any act required by the Acts or Rules to be done by such debtor, creditor, or insolvent. (p. 28, *ante*).

#### CERTIFICATE OF DISCHARGE.

Application for certificate.

Vide s. 28 (1), *Bankruptcy Act* 1883.

**293.** An insolvent intending to apply for a certificate of discharge shall make his application to the Court, in writing, in the Form No. 58 in the Appendix, with such variations as circumstances may require, and thereupon the Court shall appoint a day for hearing the application in open Court. (p. 373, *ante*).

Application.

Compare repealed rule 235, *Bankruptcy Rules* 1886.

**294.** Notice of the appointment by the Court of the day for hearing the application for a certificate in the Form No. 61 in the Appendix shall 20 days before the day so appointed be sent by prepaid post letter to each creditor, as to those creditors who have proved in the insolvency, to the address given in the creditors' proof, and as to those creditors who have not proved to the address appearing in the insolvent's schedule,



and the notice to be published by the insolvent in the *Government Gazette* of the day appointed by the Court for hearing the application shall be signed by the insolvent, and shall be in the Form No. 59 in the Appendix with such variations as circumstances may require. (p. 374, *ante*).

RR. 294-98.

Notice to creditors.

**295.** Notice of the time and place appointed by the Court for hearing the application for his certificate shall be given by the insolvent to the trustee not later than 20 days before the time so appointed. Such notice may be given by a registered letter sent by post to the last-known address of the trustee.

Notice to trustee.

Form No. 60.

Vide s. 138, Act of 1890.

**296.** Not less than three days before the day appointed by the Court for hearing the application the insolvent shall file in the Court an affidavit in the Form No. 62 in the Appendix (so far as such form is applicable), stating therein that 20 days before the day so appointed the notices to creditors and the notice to the trustee required by the two last preceding Rules have been duly sent as prescribed by the said Rules. The insolvent shall also at the same time leave with the Chief Clerk a copy of the *Government Gazette* containing the publication of the notice prescribed by section 128 of the Principal Act, and the Chief Clerk shall thereupon file with the proceedings the page of the *Government Gazette* in which such notice is published. (p. 375, *ante*).

Affidavit to be filed by insolvent.

**297.** (1) In every case of an application by an insolvent for a certificate, the report by the trustee to the Court shall be signed by him and filed in the Court seven days before the day appointed for hearing the application.

Report of trustee.

Compare r. 46, Bankruptcy Rules 1890.

(2) Such report shall afford the fullest possible information with regard to the insolvent's conduct and affairs, and the cause of his insolvency, and shall state either that the insolvent did keep proper books in the business or occupation carried on by him, and the name and character of such books; or if he did not keep proper books shall specify the books which, in his opinion, should have been kept by the insolvent, and shall state clearly the names and characters of those which the insolvent has omitted to keep. It shall be the duty of the trustee whether the report is favorable or otherwise to bring under the notice of the Court all facts which the Court ought to have in mind in considering whether a certificate should or should not be granted. It shall not be sufficient for the trustee to say that he knows of no reason why a certificate should not be granted.

**298.** Where an insolvent intends to dispute any statement with regard to his conduct and affairs contained in the trustee's report, he shall not less than two days before the hearing of the application for a certificate

Evidence in answer to report.

Compare r. 47, *ibid*.

**RR. 298-304.** give notice, in writing, to the trustee specifying the statements in the report, if any, which he proposes at the hearing to dispute. Any creditor who intends to oppose the certificate of an insolvent on grounds other than those mentioned in the trustee's report shall give notice of the intended opposition, stating the grounds thereof to the trustee not less than two days before the hearing of the application. (p. 376, *ante*).

Procedure where application not opposed.

Compare r. 120, *Insolvency Rules* 1890.

**299.** On the hearing of an application by an insolvent for a certificate of discharge, if the same be not opposed, the Court may take into consideration the depositions (if any) of the insolvent, and any written report made to the Court by the trustee or Official Accountant as to the conduct and affairs of the debtor and any evidence the insolvent may bring forward, and if the insolvent desire it and the Court shall think fit, shall direct the Chief Clerk to furnish the insolvent with notice, in writing, of matters requiring explanation, and after such explanation (if any) the Court shall decide upon the application in accordance with the Acts. (pp. 194, 375, *ante*).

Trustee or any creditor may oppose.

*Vide* s. 8 (n), *Bankruptcy Act* 1890.

Consolidation of oppositions.

**300.** The trustee or Official Accountant or any creditor who has proved his claim may without notice to the insolvent oppose the insolvent's application for a certificate. (pp. 194, 376, 379, *ante*).

**301.** Oppositions to an application for a certificate of discharge may be consolidated by order of the Court. (p. 380, *ante*).

Procedure where application opposed.

Compare r. 122, *Insolvency Rules* 1890.

**302.** If an application for a certificate be opposed the person opposing shall open his case and give such evidence, in addition to depositions of the insolvent already taken, if he relies upon any such depositions, as he may think fit, and after he has closed his case the insolvent shall open his case and give such evidence as he may think fit, and sum up the same, and the person opposing may reply. If the insolvent intends to give no evidence he shall state his intention, and the person opposing shall sum up his evidence, and the insolvent may reply. (p. 381, *ante*).

Evidence, how given.

Compare r. 123, *ibid*.

**303.** Upon application for a certificate evidence in addition to depositions of the insolvent already taken and the trustee's report and Official Accountant's report (if any) shall be given *visà voce* in open Court, but the Court may allow affidavits to be used, or the whole or part of the evidence to be taken on commission. (p. 375, *ante*).

Attendance by insolvent.

Compare r. 125, *ibid*.

**304.** The insolvent shall attend the Court on the day appointed for hearing the application for his certificate, and on any day or days of adjournment unless the Court otherwise orders, and if he fail to attend without reasonable excuse he shall be deemed guilty of contempt of Court, and may be punished accordingly. (pp. 343, 375, *ante*).

**305.** Every insolvent before applying to the Chief Clerk for an appointment for an application for a certificate shall file an affidavit stating that three months have elapsed since the date of the order of sequestration, and that his estate has paid or will pay 7s. in the £1 to all his creditors. (p. 373, *ante*).

**RR. 305-9.**  
Affidavit by insolvent before application.  
Compare r. 126, *Insolvency Rules 1890.*

**306.** If an insolvent cannot truly state that his estate has paid or will pay 7s. in the £1 to all his creditors, he shall, instead of filing the affidavit required by the last preceding Rule, file an affidavit setting out the true circumstances of his case, and that his estate has not and will not be able to pay 7s. in the £1, and he must serve notice upon the trustee and the Official Accountant and each creditor not less than 21 days before the day appointed for the hearing of the application for a certificate that he intends to apply to the Court upon the day appointed for such hearing to dispense with the condition mentioned in section 139 of the Principal Act, and the trustee and the Official Accountant and any creditor who has proved his claim may be heard in opposition to such application to dispense with such condition. (pp. 194, 373, 376, *ante*).

Affidavit by insolvent where seven shillings not paid.  
Compare r. 127, *ibid.*

**307.** Such application shall be heard upon affidavit; all depositions of the insolvent already taken in the estate, and the trustee's report and the Official Accountant's report (if any) may be read; the Court may postpone its decision upon such application until it shall have heard the application for a certificate; the Court may adjourn the hearing of any application for a certificate to give an opportunity of compliance with the condition of paying 7s. in the £1. (p. 377, *ante*).

Proceedings on application for dispensation.  
Compare r. 128, *ibid.*

**308.** If an insolvent does not apply within six months after sequestration for his certificate, a Judge, on the application of the trustee or a creditor, may order him to attend on a day named in the order, and if he attend, or, if not attending, he is brought before the Court on warrant, the Court shall proceed to hear the witnesses (if any) produced by the trustee or opposing creditor, and the Court shall then hear the insolvent's witnesses (if any) and argument as on an ordinary application, and make such order as it may think fit. (pp. 383, 384, *ante*).

Trustee or creditor may force application for certificate.  
Compare r. 131, *ibid.*

**309.** If, at the hearing of any application for a certificate of discharge, it shall appear to the Court that all costs, charges, and expenses of the assignee and trustee allowed by the Court or by these Rules have not been paid, the Judge may adjourn the hearing of the application until such costs, charges, and expenses have been paid. (pp. 59, 379, *ante*).

Court may adjourn application for costs, &c., of assignee and trustee to be paid.

**RR. 310-13.**

Order.

Compare rr. 141  
and 139 under  
*Bankruptcy Act*  
1869.Compare r. 50,  
*Bankruptcy*  
*Rules 1890.*Costs of  
application.Compare r. 48,  
*ibid.*Accounts of  
after-acquired  
property.Compare r. 53,  
*ibid.*Verification of  
statements of  
after-acquired  
property.Compare r. 54,  
*ibid.*

**310.** The order of the Court made on an application for a certificate of discharge shall not be delivered out until after the expiration of the time allowed for appeal, or if an appeal be entered, until after the decision of the Supreme Court thereon. The order shall be dated the day on which it is made, but it shall not take effect until it has been delivered out. As soon as the order has been delivered out the order shall take effect as from the day of its date. The order shall be in one of the Forms Nos. 66 to 70 in the Appendix, as the case may require. The certificate shall be in the Form No. 71 in the Appendix, with such variations as circumstances may require. (p. 378, *ante*).

**311.** An insolvent shall not be entitled to have any of the costs of or incidental to his application for a certificate of discharge allowed to him out of his estate. The Court may make such order as to the costs incurred by the trustee or the Official Accountant or any creditor of and incidental to the insolvent's application for his certificate of discharge as the Court may think fit. (pp. 59, 194, 379, *ante*).

**312.** Where an insolvent has not obtained a certificate of discharge, or where he has obtained a certificate of discharge subject to any conditions as to his future earnings or after-acquired property, or subject to the suspension of such certificate either for a specified time or until such dividend as the Court may fix has been paid to the creditors, it shall be his duty until he obtains a certificate of discharge or until such condition is satisfied, or until the period of extension has expired, or until such dividend is paid (as the case may be), from time to time to give the trustee and Official Accountant or the Court such information as the trustee, Official Accountant, or the Court may require with respect to his earnings and after-acquired property and income, or rights to property or income, and not less than once a year to file in the Court a statement showing the particulars of any property or income he may have acquired or become entitled to subsequent to his discharge. (pp. 195, 342, *ante*).

**313.** Any statement of after-acquired property or income filed by an insolvent who has not obtained a certificate of discharge or whose certificate of discharge has been granted subject to conditions shall be verified by affidavit, and the Official Accountant or trustee may require the insolvent to attend before the Court to be examined on oath with reference to the statements contained in such affidavit, or as to his earnings, income, after-acquired property, or dealings. Where an insolvent neglects to file such affidavit or to attend the Court for examination when required so to do, or properly to answer all such

questions as the Court may put or allow to be put to him, the Court may, on the application of the Official Accountant or trustee, rescind the order of discharge. The affidavit shall be in the Form No. 72 in the Appendix, with such variations as circumstances may require. (p. 342, *ante*).

RR. 313-16.

**314.** Where the insolvent applies to the Court to modify the terms of the order for a certificate of discharge on the ground that there is no reasonable probability of his being in the position to comply with the terms of such order, he shall give fourteen days' notice of the day fixed for hearing the application to the Official Accountant and the trustee, and to all his creditors. (p. 386, *ante*).

Application for modification of order.

Compare r. 55, Bankruptcy Rules 1890.

**315.** Any person intending to make application to the Court under section 152 of the Principal Act shall cause notice, in writing, to be served on the official assignee, and the creditor (if any) who opposed the grant of the certificate before the commissioner or Supreme Court as the case may be, twenty days at least before the time fixed for the hearing of such application. If the creditor who opposed is dead or has left Victoria, it shall be sufficient to serve the official assignee. The Court may on cause shown on special application direct advertisements to be inserted in lieu of service of notice. Every person applying under section 152 of the Principal Act shall file with the Chief Clerk at Melbourne an affidavit setting out the date of the sequestration, and that two years have elapsed since the refusal of the certificate by the Supreme Court or commissioner, as the case may be, and what dividend (if any) has been paid in his estate and the grounds of the refusal of his certificate, and how he has been employed in the meantime, and what have been his means (if any) of paying his creditors. The Chief Clerk of the Geelong or Beechworth districts respectively shall, upon any application being made to the Court at Melbourne under section 152 of the Principal Act regarding an estate situate in those districts, upon receiving a request in writing so to do, together with the fee of One pound, forward to the Chief Clerk at Melbourne the papers in such estate, and after the application has been disposed of the Chief Clerk at Melbourne shall return such papers. Any creditor or the official or elected assignee may appear and be heard on any application under section 152 of the Principal Act. (p. 403, *ante*).

Application for certificate under old laws.

Compare r. 132, Insolvency Rules 1890.

### PART III.—TRUSTEES—COMMITTEE OF INSPECTION—OFFICIAL ACCOUNTANT—ACCOUNTS AND AUDIT.

#### ACCOUNTS AND AUDIT.

**316.** The trustee shall keep a book to be called the "Record Book," in which he shall record all minutes, all proceedings had, and resolu-

Record Book. Compare r. 235 Bankruptcy Rules 1890.

**RR. 316-21.** tions passed at any meeting of creditors, except the general meeting, under section 53 of the Principal Act, or of the committee of inspection, and all such matters as may be necessary to give a correct view of his administration of the estate; but he shall not be bound to insert in the record any document of a confidential nature (such as the opinion of counsel on any matter affecting the interest of the creditors), nor need he exhibit such document to any person other than a member of the committee of inspection. (p. 332, *ante*).

Cash Book.  
Compare r. 286,  
*Bankruptcy*  
*Rules 1886.*

**317.** The trustee shall keep a book to be called the "Cash Book," which shall be in the Form No. 37 in the Appendix, in which he shall enter from day to day each receipt and payment made by him in such detail as will fully explain its nature. Payments for rents, salaries, wages, &c., due at the date of sequestration or liquidation by arrangement shall be entered under the head of preferential payments, and carefully distinguished from similar payments which may arise or become necessary while carrying on trade. All bank transactions, whether with local banks or insolvency estates account, shall be duly entered in bank columns, save only when local banks are used for purposes of transmission to the insolvency estates account, in which case the payments to the latter account alone should appear in the bank columns. (p. 332, *ante*).

**318.** The cash book must record the actual dates on which all moneys are received on account of an estate, and the payments out must be entered under the date when cheques are issued, except in the case of dividends, which must be entered as of the date when the cheques are received. (p. 332, *ante*).

Books to be  
submitted to  
committee of  
inspection.  
Compare r. 287,  
*ibid.*

**319.** The trustee shall submit the record book and cash book, together with any other requisite books and vouchers, to the committee of inspection (if any) when required, and not less than once every three months, and to the Judge or Official Accountant when required. (pp. 191, 198, 333, *ante*).

Audit of cash  
book.  
Compare r. 288,  
*ibid.*

**320.** The committee of inspection (if any) shall not less than once every three months audit the cash book and certify therein under their hands the day on which the said book was audited. The certificate shall be in the Form No. 100 in the Appendix, with such variations as circumstances may require. (pp. 198, 333, *ante*).

Official  
Accountant's  
audit of trustee's  
accounts.  
Compare r. 289,  
*ibid.*

**321.** (1) Every trustee shall, at the expiration of six months from the date of his appointment, and at the expiration of every succeeding six months thereafter, transmit to the Official Accountant the record book, together with any original resolutions of the creditors or committee of

inspection not entered in the record book, and a duplicate copy of the cash book for such period, verified by affidavit, together with the vouchers for all payments and allocations for taxable charges and copies of the certificates of audit by the committee of inspection (if any). He shall also forward with the first accounts one office copy of lists A, D, E, and F of the insolvent's schedule, or of sheets B, C, F, G, and H of the debtor's statement of affairs, showing thereon respectively in red ink the amounts realized, and explaining the cause of the non-realization of such assets as may be unrealized. (pp. 192, 333, *ante*). **RR. 321-26.**

(2) The trustee shall at each audit forward to the Official Accountant a report on the position of the estate. (pp. 192, 334, *ante*). Report with audit.  
Compare r. 259,  
*Bankruptcy  
Rules 1886.*

(3) When the estate has been fully realized and distributed, the trustee shall forthwith send in his accounts to the Official Accountant although the six months may not have expired. (pp. 192, 334, *ante*). Accounts of trustee on full realization and distribution of estate.  
Compare r. 289,  
*ibid.*

(4) The accounts sent in by the trustee shall be certified and verified by him according to the Form No. 99 in the Appendix. (pp. 192, 334, *ante*).

**322.** When the trustee's account has been audited, the Official Accountant shall certify that the account has been duly passed, and thereupon the duplicate copy, bearing a like certificate, shall be transmitted to the Chief Clerk, who shall file the same with the proceedings in the sequestration. (pp. 192, 334, *ante*). Trustee's account to be certified and verified.  
Compare r. 280  
*ibid.*

**323.** Where a trustee has not since the date of his appointment, or since the last audit of his accounts, as the case may be, received or paid any sum of money on account of the debtor's estate, he shall at the period when he is required to transmit his estate account to the Official Accountant, forward to the Official Accountant an affidavit of no receipts or payments. (pp. 192, 334, *ante*). Copy of accounts to be filed.  
Affidavit of no receipts.  
Compare r. 291,  
*ibid.*

**324.** Where at the first audit an affidavit of no receipts or payments is furnished, the trustee shall forward therewith a copy of the assignee's account of receipts and payments as shown by the estate cash book on transfer to the trustee. (p. 334, *ante*). Where affidavit of no receipts or payments at first audit.

**325.** Upon a trustee resigning or being released or removed from his office, he shall deliver over to the Official Accountant, or as the case may be, to the new trustee, all books kept by him, and all other books, documents, papers, and accounts in his possession relating to the office of trustee. (pp. 175, 193, *ante*). Proceedings on resignation, &c. of trustee.  
Compare r. 292,  
*ibid.*

**326.** Where an order of sequestration has been made against debtors in partnership, distinct accounts shall be kept of the joint estate and of the separate estate or estates, and no transfer of a surplus from a sep- Joint and separate estates' accounts.  
Compare r. 293,  
*ibid.*

**RR. 326-33.** arate estate to the joint estate on the ground that there are no creditors under such separate estate shall be made until notice of the intention to make such transfer has been published in the *Government Gazette* and in one of the Melbourne daily newspapers and in some local newspaper when the proceedings are not being prosecuted in Melbourne. (pp. 327, 328, *ante*).

Disposal of bankrupt's books and papers.

Compare r. 294, *Bankruptcy Rules* 1898.

Expenses of sales.

Compare r. 295, *ibid.*

**327.** The Court may, on the application of the trustee, direct in what manner the debtor's books of account and other documents given up by him or any of them may be disposed of. (p. 318, *ante*).

**328.** Where property forming part of a debtor's estate is sold by the trustee through an auctioneer or other agent the gross proceeds of the sale shall be paid over by such auctioneer or agent, and the charges and expenses connected with the sale shall afterwards be paid to such auctioneer or agent on the production of the necessary allocatur of the Chief Clerk. Every trustee by whom such auctioneer or agent is employed shall be accountable for the proceeds of every such sale. (p. 184, *ante*).

Sales by private contract.

**329.** In the case of any sale by private contract the trustees account shall show the name, address, and occupation of the purchaser, and the mode in which the amount of the purchase money has been arrived at. (p. 184, *ante*).

Allowance to debtor.

Compare r. 296, *ibid.*

**330.** In any case in which, under the provisions of section 120 of the Principal Act, a trustee makes an allowance to an insolvent out of his property, such allowance, unless the creditors by special resolution determine otherwise, shall be in money, and the amount allowed shall be duly entered in the trustees accounts. (p. 181, *ante*).

Solicitor's bill of costs to be taxed.

**331.** A trustee shall not be allowed in his accounts any sum paid by him to his solicitor for his bill of costs unless the same shall have been duly taxed as between solicitor and client. (p. 50, *ante*).

#### TRUSTEES.

Application to the Court for registration.

**332.** Every application to the Court under section 17, sub-section (1) of the *Insolvency Act* 1897, shall be made by motion.

Application to be advertised, &c.

**333.** No order under said section 17 sub-section (1) that any person shall be registered as qualified to be appointed to the office of trustee under the Acts shall be made except after the expiration of fourteen days from the publication of an advertisement by the applicant or some solicitor on his behalf in the *Government Gazette* and in one of the Melbourne daily newspapers, and also in some local newspaper where



the applicant resides, if not in the Melbourne district, and from the giving of notice in writing by him or some solicitor on his behalf to the Official Accountant of his intention to apply to be so registered. (p. 190, *ante*). **RR. 333-42.**

**334.** Every such application shall be made to the Court of the district in which the applicant resides.\* Where to be made.

**335.** Every such application shall be supported by an affidavit setting forth the giving of notice to the Official Accountant, and by an affidavit according to Form No. 180 in the Appendix. Affidavit in support.

**336.** The Official Accountant or any person may, without notice to the applicant, oppose such application. (pp. 168, 190, *ante*). Opposition.

**337.** Application to cancel any such registration or any registration of a trustee under section 18 of the *Insolvency Act* 1897 may be made to the Court at any time by the Official Accountant or any creditor or person. (pp. 168, 191, *ante*). Application to cancel registration.

**338.** The security to be given by a trustee under the Acts shall be in the form of a bond to be executed to the Official Accountant to enure for the benefit of the Official Accountant for the time being his successors and assigns with two sufficient sureties to be approved of by the Chief Clerk, conditioned for the faithful and sufficient performance and execution from time to time of all and singular the duties required of him as trustee by the Insolvency Acts, or any rule of Court made or hereafter to be made. Such bond shall be in the Form No. 32 in the Appendix. (p. 191, *ante*). Security by trustee. Compare s. 15, Administration and Probate Act 1890 and rules thereunder.

**339.** Such bond, if general, shall be taken in a penal sum of £2,000, and in all other cases the bond shall be in a penalty of £1,000, which may from time to time, if the Court shall think fit, be increased to any sum not exceeding £2,000, or diminish to any sum not less than £100. Amount of bond.

**340.** The sureties shall make an affidavit of their sufficiency (which shall be in the Form No. 33 in the Appendix), and such sureties shall attend the Chief Clerk to be examined if required. Justification by sureties.

**341.** The bond shall be executed in the presence of and attested by the Chief Clerk, or before a Commissioner of the Supreme Court of Victoria for taking affidavits in Victoria, not being the solicitor or clerk of the solicitor of the trustee. Execution and attestation of bond.

**342.** A trustee may, in lieu of giving security deposit, in Court a sum equal to the sum in respect of which he is required to give security, Deposits in Court in lieu of bond. Compare r. 66, Insolvency Rules 1890.

This rule has been relaxed in practice by allowing the applications of persons in the country to be made in Melbourne.

**RR. 342-49.** together with a memorandum to be approved by the Judge of the Court, and to be signed by such trustee, setting forth the conditions on which the money is deposited.

Bond by  
incorporated  
company or  
guarantee  
society.  
Compare  
*Administration  
and Probate Act*  
1890, s. 16.  
Compare r. 11,  
*Supreme Court  
Rules* 1873.

**343.** Security of any incorporated company or guarantee society, approved of by the Governor in Council under the Administration and Probate Acts, may be given in place of such bond with sureties or deposit.

**344.** When the bond of an incorporated company or guarantee society is given, such bond and the condition thereof shall be in the Form No. 32 of the Appendix, substituting the name of such company or society for those of the individuals.

Deposit of bond  
with Chief Clerk.

**345.** In all cases where the security is by bond the bond shall be deposited with the Chief Clerk.

Premium not to  
be allowed  
against estate.  
Compare r. 12,  
*ibid.*

**346.** The cost of the premium on a trustee's guarantee bond shall not, nor shall the price a trustee may pay for procuring the security either of individuals or of a company or society, be allowed against any estate.

Assignment of  
bond.  
Compare  
*Administration  
and Probate Act*  
1890, s. 17.

**347.** The Court may, on application made on motion in a summary way, and on being satisfied that the condition of any such bond has been broken, order the Official Accountant to assign the same to some person to be named in such order, and such person, his executors or administrators, shall thereupon be entitled to sue upon the said bond in his or their own name or names as if the same had been originally given to him, and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond. (pp. 168, 191, *ante*).

Notice of  
appointment.  
Compare r. 293,  
*Bankruptcy  
Rules* 1896.

**348.** When an order of the Court is made confirming the appointment of a trustee, the trustee shall forthwith insert notice of his appointment in the *Government Gazette* and a local newspaper in the Form No. 36 in the Appendix. The expense of such gazetting and notice may be charged by the trustee to the estate. (p. 171, *ante*).

Refusal to  
confirm, &c.,  
trustee.  
Compare r. 301,  
*ibid.*

**349.** It shall be a sufficient reason for refusing to confirm the appointment of or to order the registration of a person as trustee that he has not complied with the requirements of section 127 of the Principal Act or sections 60 or 85 of the *Insolvency Act* 1897 or that in any other proceeding under the Acts such person has either been removed under section 57 of the Principal Act, or section 30, sub-section (2) of the *Insolvency Act* 1897 from the office of trustee, or has failed or neglected, without good cause shown by him, to render his accounts for audit for one month after the date by which the same should have been rendered (p. 172, *ante*).

**350.** (1) Where a trustee has given security in the manner hereinbefore prescribed, but fails to keep up such security, the Court may, if it think fit, remove him from his office. (p. 174, *ante*). **RR. 350-54.**

Removal for failing to keep up security.

Compare r. 302, *Bankruptcy Rules 1896*.

A person registered under section 17 of Act 1897 not giving security.

(2) If a person ordered to be registered under section 17 of the *Insolvency Act 1897* do not give the prescribed security within twenty-one days after the date of the order for his registration, the Court may, if it think fit, order such registration to be cancelled. (p. 168, *ante*).

(3) If a person ordered to be registered under section 18 of the *Insolvency Act 1897* in respect of a particular estate do not give the prescribed security within seven days after the date of the order for his registration, the Court may, if it think fit, order such registration to be cancelled and remove such person from his office. (p. 168, *ante*).

A person registered under section 18 of Act 1897 not giving security.

**351.** The trustee or trustees or, in estates in which there is no trustee, the assignee shall file the statements mentioned in section 124 of the Principal Act on the first days of the months of January, April, July and October in each year. (p. 338, *ante*).

Statement of application and disposal of estate.

Compare r. 111, *Insolvency Rules 1896*.

**352.** Such statements shall be in the Form No. 38 in the Appendix, and shall be verified by the affidavit of such trustee or trustees or assignee, and shall state upon its face whether it be an interim or final statement of the estate. (p. 339, *ante*).

Form No. 38.

Compare *ibid*.

**353.** In addition to the statement mentioned in section 124 of the Principal Act the trustee or trustees or, in estates in which there is no trustee, the assignee shall, on the first day of the months of January, April, July, and October in each year, file a statement of all and singular the assets of the estate which have come to his hands, possession, or knowledge as such trustee or assignee, or into the hands of any person on his behalf, and stating opposite each item whether the same has or has not been realized, and if realized the amount received for the same, and further showing all moneys received in the estate, and the balance in hand which has not been paid away or distributed. Such statement shall be in the Form No. 39 in the Appendix, and shall be verified by the affidavit of such trustee or trustees or assignee, and shall state upon its face whether it be an interim or final statement of the receipts and assets of the estate. (p. 339, *ante*).

Statement of assets.

Compare r. 112, *ibid*.

Form No. 39.

**354.** Each trustee shall also within fourteen days after the 31st of December in each year transmit to the Official Accountant a statement according to the Form No. 178 in the Appendix, verified by affidavit of every insolvency or liquidation in which he is a trustee, and the Official Accountant shall preserve such returns in his office, and

Annual returns by trustees to Official Accountant.

Compare r. 250, *Rules under Bankruptcy Act 1896*.

**RR. 354-60.** which returns may be searched by the public. And any trustee who shall fail to make such return may be removed from his office by the Court at the instance of any one creditor or of the Official Accountant or be subject to such order and to such costs as the Court may think proper to make. (pp. 174, 193, 339, *ante*).

Application by trustee for leave to resign to be made by motion.

**355.** Every application to the Court by a trustee for leave to resign his office shall be made by motion. (p. 175, *ante*).

Notice of resignation.  
Compare r. 304,  
*Bankruptcy Rules* 1880.

**356.** A trustee intending to resign his office shall give not less than seven days' notice of his intention to apply to the Court for leave to every creditor who has proved his claim and to the Official Accountant. (p. 175, *ante*).

Opposition to application.

**357.** The Official Accountant, or any creditor who has proved his claim, may, without notice to the trustee, oppose the trustee's application for leave to resign. (pp. 175, 193, *ante*).

Rate of remuneration.  
Compare r. 305,  
*ibid*.

**358.** The creditors, or as the case may be, the Committee of Inspection, in voting the remuneration of the trustee, shall distinguish between the commission of percentage payable on the amount realized and the commission of percentage payable on the amount distributed in dividend. In calculating the percentage payable on the amount realized, sums paid to secured creditors (in respect of their securities) and moneys expended in carrying on the trade or business must be deducted from the total receipts. The percentage payable on dividend shall not be charged until the dividend is in course of payment. (p. 63, *ante*).

Limit of remuneration.  
Compare r. 306,  
*ibid*.

**359.** (1) Except as provided by the Acts or Rules, no trustee shall be entitled to receive out of the estate any remuneration for services rendered to the estate, except the remuneration to which under the Acts and Rules he is entitled as trustee. (p. 63, *ante*).

(2) A trustee shall not be entitled to make a profit charge in respect of keeping possession of the debtor's estate, but only to charge the amount actually paid. A trustee shall terminate the possession at the earliest possible date. (p. 63, *ante*).

Trustee carrying on business.  
Compare r. 308,  
*ibid*.

**360.** (1) Where the trustee carries on the business of the debtor, he shall keep a distinct account of the trading, and shall incorporate in the cash book the total weekly amount of the receipts and payments on such trading account. (pp. 180, 333, *ante*).

(2) The trading account shall from time to time, and not less than once in every month, be verified by a statutory declaration of the trustee, and the trustee shall thereupon submit such account to the Committee of Inspection (if any), or such member thereof as may be appointed by

the committee for that purpose, who shall examine and certify the same. **RR. 360-67.**  
(pp. 180, 198, *ante*).

**361.** When one-sixth of the creditors in number or value who have proved desire that a general meeting of the creditors may be summoned to consider the propriety of removing the trustee, such meeting may be summoned by a member of the Committee of Inspection or by the Chief Clerk on the deposit of a sum which he considers sufficient to defray the expenses of summoning such meeting, and such sum shall be repaid to them out of the estate if the creditors or the Court so direct. (p. 173, *ante*).

Meeting to consider conduct of trustee.

Compare r. 311, *Bankruptcy Rules 1888.*

**362.** Where a trustee desires to apply to the Court for directions in any matter, he may file an application in the Form No. 86 in the Appendix. The Court shall then hear the application or fix a day for hearing it, and direct the trustee to apply by motion. (p. 178, *ante*).

Application for directions.

Compare r. 313, *ibid.*

**363.** Where, in pursuance of section 39 of the *Insolvency Act 1897*, the trustee is required to transmit to creditors a statement of the accounts, such statement shall be in the Form No. 104 in the Appendix, with such variations as circumstances may require, and the cost of furnishing and transmitting such statement shall be calculated at the rate of Threepence per folio for each statement where the creditors do not exceed ten, and where the creditors exceed ten, One shilling per folio for the preparation of the statement and the actual cost of printing. (pp. 178, 338, *ante*).

Statements of accounts to be furnished to creditors.

Compare r. 66, *Bankruptcy Rules 1890.*

**364.** Where the trustee is an auctioneer, he shall not by himself or any partner act as such in the sale of any of the property vested in him, except by leave of the Court upon such terms as it may think fit. (p. 184, *ante*).

Sales when trustee an auctioneer.

Compare r. 105, *Insolvency Rules 1890.*

**365.** In any case in which the sanction of the Court is obtained under section 51 or 52 of the *Insolvency Act 1897*, the cost of obtaining such sanction shall be borne by the person in whose interest such sanction is obtained, and shall not be payable out of the debtor's estate. (p. 60, *ante*).

Cost of obtaining sanction under sections 51 or 52 of the *Insolvency Act 1897.*

Compare r. 67 (2), *ibid.*

#### ASSIGNEE.

**366.** Where a debtor's estate is sequestrated or adjudged to be sequestrated, the assignee upon the appointment of a trustee shall forthwith put the trustee into possession of all property of the insolvent of which the assignee may be possessed. (p. 166, *ante*).

Estate to be handed by assignee to trustee.

Compare r. 318, *Bankruptcy Rules 1888.*

**367.** (1) It shall be the duty of the assignee, if so requested by the trustee, to communicate to the trustee all such information respecting

Compare r. 318, *ibid.*

**RR. 367-72.** the insolvent and his estate and affairs as may be necessary or conducive to the due discharge of the duties of the trustee. (p. 166, *ante*).

(2) The assignee shall give a receipt for all books lodged with him by the insolvent specifying the same. Such receipt shall be in duplicate, and such duplicate shall be signed by the insolvent as correct, and then retained by the assignee. (p. 166, *ante*).

#### ACCOUNTING BY ASSIGNEES AND TRUSTEES.

Compare r. 336  
(2) *Bankruptcy  
Rules 1896.*

**368.** Where a debtor's estate is sequestrated or adjudged to be sequestrated, and a trustee is appointed, the assignee shall account to the trustee in the insolvency. (p. 166, *ante*).

**369.** Where an insolvent's estate is ordered to be released from sequestration, the assignee or trustee, as the case may be, shall account to the insolvent. (pp. 166, 345, *ante*).

#### COMMITTEE OF INSPECTION.

Quorum of committee of inspection.

Compare r. 103,  
*Insolvency Rules 1890.*

**370.** Where the creditors neglect by resolution to fix the quorum required to be present at a meeting of the Committee of Inspection, the quorum shall be three, or if the number of the committee be less than three, the quorum shall be the whole number. A resolution of the Committee of Inspection shall be passed unanimously or by a majority in number of the members present at the meeting. (p. 196, *ante*).

Sanction of payments to members of committee of inspection.

Compare r. 68,  
*Bankruptcy Rules 1890.*

**371.** Where the sanction of the Court under section 65 of the *Insolvency Act 1897* to a payment to a member of a Committee of Inspection for services rendered by him in connexion with administration of the estate is obtained, the order of the Court shall specify the nature of the services, and shall only be given where the service performed is of a special nature. No payment shall under any circumstances be allowed to a member of a committee for services rendered by him in the discharge of the duties attaching to his office as a member of such committee. (pp. 196, 199, *ante*).

#### OFFICIAL ACCOUNTANT.

Meetings of creditors to consider conduct of trustee.  
Compare r. 319,  
*Bankruptcy Rules 1896.*

**372.** Where the Official Accountant is of opinion that any act done by a trustee, or any resolution passed by a Committee of Inspection, should be brought to the notice of the creditors for the purpose of being reviewed or otherwise, the Official Accountant may summon a meeting of creditors accordingly to consider the same, and the expense of summoning such meeting shall be paid by the trustee out of any available assets under his control. (pp. 194, 196, *ante*).

**373.** In any case of sudden emergency where there is no trustee or assignee capable of acting, any act or thing required or authorized to be done by a trustee or assignee may be done by the Official Accountant. (p. 194, *ante*).

**RR. 373-79.**  
Official Accountant to act in sudden emergency.  
Compare r. 330, *Bankruptcy Rules* 1886.

**374.** Where there is no Committee of Inspection, any functions of the Committee of Inspection may be exercised by the Official Accountant. (pp. 194, 197, *ante*).

Where no committee of inspection, Official Accountant to exercise its functions.  
Compare r. 337, *ibid*.  
Costs and expenses of Official Accountant.  
Compare r. 339, *ibid*.

**375.** The costs and expenses which the Official Accountant may have to pay, or to which he may be put in doing any act or thing under either of the two last preceding rules, shall be paid out of the estate of the debtor. (p. 194, *ante*).

#### PAYMENTS INTO AND OUT OF A BANK.

**376.** Where the creditors by resolution direct that the trustee of any estate shall keep an account in a bank to be named in such resolution, or where the trustee is authorized by the Court to have an account with a bank, such account shall be opened and kept by the trustee in the name of the insolvent's or debtor's estate, and he shall pay all moneys received by him into such bank to the credit of the estate. All payments out of such bank shall be made by cheque payable to order, and every cheque shall have marked or written on the face of it the name of the estate, and shall be signed by the trustee, and shall be countersigned by at least one member of the Committee of Inspection, and by such other person (if any) as the creditors or the Committee of Inspection or the Court may appoint. (pp. 158, 198, 335, *ante*).

Local bank.  
Compare r. 340, *ibid*.

**377.** The trustee shall bank all collections daily, and a book initialed by the bank teller showing the nature of the deposits shall be kept for reference. Post-office orders shall not be cashed, but shall be shown in the bank deposits. (p. 335, *ante*).

Trustees to bank daily.

**378.** All moneys received by a trustee, whether a special banking account has been authorized or not, shall be entered in the trustee's general cash book and appear in his general account. (p. 332, *ante*).

Trustee to enter all money.

#### PART IV.

**PROCEEDINGS FOR LIQUIDATION BY ARRANGEMENT OR COMPOSITION WITH CREDITORS (SECTIONS 153 AND 154).** (pp. 411 to 439, *ante*).

Commencement of proceedings for arrangement or composition.

**379.** Proceedings under these sections shall be instituted by the debtor by petition and affidavit thereto annexed, according to the Forms

Rules 379 to 438 —compare rules 134 to 176, *Insolvency Rules*

**RR. 379-83.** Nos. 147 and 148 in the Appendix, and such petition and affidavit shall be forthwith filed. (p. 412, *ante*).

1890, and rules  
252 to 315 made  
under *Bank-  
ruptcy Act 1880*.  
Place and time  
of first meeting.

**380.** (1) The first general meeting shall be summoned to be held at the place mentioned in the affidavit filed with the petition (subject to such place being changed by order of the Court, as hereinafter provided), and the time of meeting shall be at a stated hour between half-past ten and four p.m. on a day within six weeks from the filing of the petition, unless the Court in any particular case shall otherwise order. (p. 413, *ante*).

Notice and  
summoning  
first meeting.

(2) The first general meeting of creditors shall be summoned by the debtor by sending by prepaid post letter to each of his creditors, or, if dead, their personal representatives, or if out of the colony, their agents, a notice in the Form No. 149 in the Appendix. (p. 413, *ante*).

Notice of  
meeting to be  
advertised and  
gazetted.

(3) The debtor shall also cause notice of the meeting, in the Form No. 151 in the Appendix, to be advertised in the *Government Gazette* and in one of the Melbourne daily newspapers, and also in some local newspaper if the proceedings are not being prosecuted in the Melbourne district, seven days before the meeting is to be held. (p. 413, *ante*).

Time of posting  
notices.

**381.** Notices summoning any first general meeting shall be posted at least five days before the day on which the meeting is to be held. A notice posted to a firm at its place of business shall be sufficient notice to the partners thereof. Notice may be posted to the manager, inspector, or secretary, or other head officer of any corporation. (p. 413, *ante*).

Affidavit of  
service of  
notices.

**382.** The person posting the said notices shall forthwith make and file an affidavit exhibiting a form of notice and a list of creditors, and stating that he had posted similar notices to the persons mentioned in the said list, and stating also the date, time, and place of posting. (p. 413, *ante*).

Change of place  
of meeting.

**383.** Upon sufficient cause, proved to the satisfaction of the Court by the debtor, or by any creditor, either *ex parte* or otherwise, the Court may order and direct the place of any general meeting to be changed, provided application be made in such time as will allow notice of the change to be given to the creditors. Any order so made by the Court shall be according to the Form No. 155 in the Appendix; and notice thereof shall be posted by the debtor or creditor on whose application the order is granted to the creditors, on or before the third day prior to the meeting. (p. 413, *ante*).



**384.** Every debtor shall state in his petition the estimated amount of the debts owing by him to his creditors, and a majority in value of such creditors may at any time prior to the passing of the special or extraordinary resolution (as the case may be) nominate and appoint a receiver or manager of the trade effects or business of the debtor, or any part thereof, according to the Form No. 152 in the Appendix. Where any such receiver or manager has been so appointed, he shall investigate the state of the debtor's affairs, and report thereon to the general meeting of creditors. The nomination and appointment of any such receiver or manager shall be confirmed by the Court upon summary application in any case in which the debtor refuses to give possession or control to the receiver or manager so appointed. Any such nomination-paper shall be in duplicate, and may be signed by the creditors in their individual or partnership names, or by some person who shall state in his signature that he does so by procuration on the creditor's behalf. The signatures or debts need not be verified further than by the affidavit of one of the three principal creditors signing the nomination-paper (or a partner in the firm of one of them) and such affidavit shall be filed in Court with one of the nomination-papers. (pp. 413, 414, *ante*).

RR. 384-89.

Appointment of receiver by creditors.

**385.** Where a receiver or manager has been appointed, the Court may at any time cancel his appointment by consent of the debtor and of the creditor or creditors upon whose application the appointment was made, or if the Court shall see fit. (p. 414, *ante*).

Cancelling appointment of receiver or manager.

**386.** When a receiver or manager has been appointed, he shall be entitled to the custody of the books and effects of the debtor, and the debtor or any person having the previous custody thereof on his behalf shall forthwith deliver the same to the receiver or manager. (p. 414, *ante*).

Custody of books and effects.

**387.** The receiver or manager shall at all times permit the debtor or any of his creditors or their agents to have access to and inspect the debtor's books of account. (p. 414, *ante*).

Inspection of books.

**388.** If a receiver or manager has been appointed, his duties shall terminate upon the appointment of a trustee, in cases of liquidation by arrangement, and upon the approval of a composition in cases of composition, unless the resolution for composition shall otherwise provide. (p. 414, *ante*).

Termination of receiver's duties.

**389.** Where a receiver or manager has been appointed, and his duties are concluded, he shall render his accounts, and pay or deliver over any money or property in his hands to the trustee (in cases of liquidation by arrangement) or to the debtor or his nominee (in cases of composition).

Receiver to render account.

**RR. 390-96.**

Remuneration,  
removal, and  
accounts of  
receiver.

**390.** The Court shall have the same power and discretion as to the remuneration and removal of the receiver or manager and in the settlement of his accounts, and in directing the appropriation of moneys or property in his hands, as it can exercise in the case of a trustee in insolvency. (p. 414, *ante*).

Chairman.

**391.** The chairman of the first general meeting shall be elected by a majority of the persons present thereat claiming to be or to represent creditors. The chairman of any subsequent general meeting shall be elected by a majority in value of the creditors present or represented thereat who have proved their debts. (p. 414, *ante*).

Proofs and  
proxies.

**392.** Creditors may prove their debts by affidavit or declaration, and appoint proxies, as in insolvency. (p. 415, *ante*).

Debts which  
may be proved.

**393.** All debts which would have been provable in insolvency had the estate of the debtor been sequestrated, or adjudged to be sequestrated at the date of the institution of the proceedings, shall be provable under any such proceedings. (p. 415, *ante*).

Proofs and  
proxies to be  
handed to  
chairman.

**394.** All proofs and proxies intended to be used at any general meeting shall be handed in to the chairman of the meeting, any objection thereto shall be marked thereon by the chairman, and shall in the case of composition be dealt with by the Court on its considering the composition, and, in the case of a liquidation by arrangement by the Chief Clerk, upon the extraordinary resolution therefor being presented to him for registration. (p. 415, *ante*).

Proof by secured  
creditor.

**395.** A secured creditor, unless he shall have realized his security, shall, previously to being allowed to prove or vote, state in his proof the particulars of his security and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him after deducting such assessed value of the security. In cases of liquidation by arrangement, any secured creditor so proving shall be bound to pay over to the trustee the amount which his security shall produce beyond the amount of such assessed value, and the trustee shall be entitled, at any time before realization of such security by the creditor, to redeem the same upon payment of such assessed value. The proof of any secured creditor shall not be increased in the event of the security realizing a less sum than the value at which he has so assessed the same. (p. 415, *ante*).

Retiring from a  
meeting.

**396.** Where any creditor shall desire to retire from any meeting, and not to be considered as present, he may withdraw his proof without

prejudice to his again proving his debt on any subsequent occasion. (p. RR. 396-400. 415, ante).

**397.** The debtor shall produce to the first general meeting, and also, in case there be any, to the second general meeting, a statement showing the whole of his debts and assets, and the names and addresses of the creditors to whom such debts respectively are due. The name of each creditor in such list shall be numbered consecutively, and the list of creditors whose debts do not exceed £25 shall be separated from and follow after the list of those creditors whose debts exceed that amount. The debtor's statement of affairs shall be in the Form No. 153 in the Appendix, with such variations or additions as circumstances may require. (p. 415, *ante*).

Debtor to produce statement at meetings.

**398.** The resolution passed at the first general meeting (or first and second general meetings, as the case may be) shall determine whether the affairs of the debtor are to be liquidated by arrangement and not in insolvency, or whether any and what composition shall be accepted in satisfaction of the debts due to the creditors from the debtor, or it may reject either of such modes of arrangement. The resolution may declare to whom the registration of the resolution and the debtor's statement of affairs shall be intrusted, and the original resolution and the statement shall forthwith be delivered accordingly to the person so appointed; and, in the event of no such declaration being made in the resolution, the same shall be registered by the debtor. Only such resolutions as are reduced into writing and are signed by or on behalf of the statutory majority of the creditors assembled at a meeting shall be taken cognisance of by the Court, but the signatures of such creditors may be subscribed subsequently to the meeting but prior to the filing or registration of the resolution. (p. 417, *ante*).

Resolutions as to arrangement or composition to be passed and registered.

**399.** The chairman shall be bound forthwith to deliver to the person (if any) so appointed, or, in default of such appointment, to the debtor, every declaration or affidavit for proof of debt, and proxy paper, of what nature or kind soever, and whether in due form or otherwise which shall have been received at the general meeting or meetings, and also the debtor's statement of affairs, and, in default thereof, may be summoned before the Court, and the Court may make such order in the matter as it shall think fit. (p. 419, *ante*).

Chairman to deliver proofs, proxies, and statement to the person appointed by creditors or to debtor.

**400.** The person to whom the registration of the extraordinary resolution may have been intrusted or the debtor, or his solicitor, as the case may be, shall file the same in Court together with the debtor's statement of affairs, and all proofs and proxies, within three days after

Filing resolutions, statements, proofs, and proxies.

**RR. 400-3.**

he shall have received the same, or in default thereof shall be summoned before the Court, and some person able to depose thereto shall verify and identify the resolutions, statement, proofs, and proxies so filed as being the whole of the resolutions, statement, proofs, and proxies come to and produced at the meeting or meetings when such extraordinary resolution was passed. (p. 419, *ante*).

Class meetings where debtors in partnership same trustee of joint and separate parties, provision as to surplus.

**401.** In cases of proceedings for liquidation by arrangement or composition instituted by partners, separate meetings of the different classes of creditors shall be held, thus: If the partnership consists of A, B, and C, a meeting of the joint creditors of A, B, and C shall be first held, and separate meetings of the separate creditors of A, B, and C shall be held at a date or time subsequent to the meeting of the partnership creditors. The joint creditors may come to such resolution as they may think fit with regard to the joint estate. The separate creditors may also come to such resolution as they may think fit as regards the liquidation of the estate of their individual debtor; but in the event of their determining upon his sequestrating his estate or the liquidation of his estate by arrangement, they shall choose the same trustee (if any) as has been or shall be appointed by the joint or partnership creditors but they may appoint a committee of inspection from their own body, if they think fit, or they may adopt the committee (if any) appointed by the joint or partnership creditors. In the event of the separate creditors of any such debtor agreeing to accept a composition in cases where the joint creditors have resolved on a liquidation by arrangement the assets of such separate debtor shall be made available by the trustee for or towards the payment thereof in such manner as the Court shall direct and approve, and any surplus of such separate estate remaining in the hands of the trustee after payment of or provision for such composition and all proper costs incurred in connexion therewith shall be deemed partnership assets. If in any such case the separate debtor shall be a member of more than one firm, the surplus of his separate estate shall be applied in such manner as the Court may direct. (p. 419, *ante*).

Separate resolution in case of minor partnership, provision as to surplus.

**402.** If the petition be by partners, and any two or more of such partners constitute a separate and independent firm, the creditors of such firm may likewise come to a separate resolution as regards the liquidation of such minor partnership estate, and where any surplus shall arise upon the liquidation thereof, the same shall be carried over to the separate estates of the partners in such minor firm according to their respective rights therein. (p. 419, *ante*).

Persons deemed creditors, different

**403.** In cases of proceedings for or towards liquidation by arrangement or composition by an individual debtor, his creditors and debts

shall be deemed to be and include not only those creditors to whom or those debts in respect of which he is individually responsible, but also those creditors and debts to whom or in respect of which he is also responsible jointly with any other person or persons ; and the statutory majority required for the purpose of any resolution shall be a collective majority of the whole of such joint and separate creditors at any meeting. In any such last-mentioned proceedings the terms of the resolution as regards joint and separate creditors need not be identical, and if so desired the resolution may provide for the payment of a composition to the separate creditors, and that the rights of the joint creditors shall not be prejudiced or affected thereby. (pp. 419, 420, *ante*).

RR. 403-9.

resolutions may be passed as to joint and separate creditors.

**404.** Resolutions duly come to at any meeting shall have full force and effect, notwithstanding that it may be also resolved that for other purposes the meeting shall stand adjourned. (p. 420, *ante*).

Resolutions not affected by adjournment.

**405.** In the event of a liquidation by arrangement or composition, any mistake made inadvertently by a debtor in the statement of his debts may be corrected with the assent of a majority in value of his creditors assembled at a general meeting similarly summoned by the debtor. (p. 417, *ante*).

Mistakes how corrected.

**406.** The extraordinary resolution for liquidation by arrangement, or composition and statement of the debtor's affairs, and all other proceedings when filed or registered shall at all times be open for inspection by the Official Accountant and any creditor whose name appears on the statement, or by any person duly authorized on his behalf. (pp. 195, 420, *ante*).

Resolution and statement may be inspected.

**407.** Where insolvency occurs pending proceedings for or towards liquidation by arrangement or composition with creditors, the proper costs incurred in relation to such proceedings shall be paid by the trustee under the insolvency out of the debtor's estate, unless the Court shall otherwise order. (p. 60, *ante*).

Costs of arrangement or composition upon insolvency.

**408.** Proof of debt by any creditor under any liquidation by arrangement or composition, shall be deemed conclusive evidence that notice of all general meetings prior to and inclusive of that at which such proof is produced has been duly given to him. (p. 421, *ante*).

Proof of debt admits notice of general meeting &c.

**409.** General meetings subsequent to the appointment of a trustee shall be summoned by him by giving four days' notice by post to each of the creditors who have proved their debts, stating the object of the meeting, and the business proposed to be transacted thereat. A general meeting may, however, at any time be similarly summoned by any

General meetings after appointment of trustee.

**RR. 409-15.** creditor with the concurrence, including himself, of one-sixth in number and value of the creditors who have proved their debts. (p. 421, *ante*).

Second meeting  
in case of  
arrangement.

**410.** In the event of a liquidation by arrangement being resolved upon, and no trustee being appointed at the meeting at which such resolution was passed, or if appointed declines to act or becomes incapable of acting, or is removed and no other trustee is appointed, on such refusal to act, incapacity, or removal, then and in any of such cases the Court shall have the same power of appointing a trustee as in the case of a vacancy occurring in the office of a trustee in insolvency. (p. 421, *ante*).

Removal or  
death of a  
trustee.

**411.** In the case of a liquidation a trustee may be removed by a special resolution of the creditors assembled at a general meeting summoned for the purpose, and another trustee may be appointed in his place by a majority in value of the creditors then present or represented. Where a trustee shall die or where for any reason there shall be no trustee acting in liquidation, a general meeting may be summoned in manner hereinbefore directed, and another trustee may be appointed by the majority in value of the creditors present or represented thereat. (p. 422, *ante*).

Certificate of  
appointment of  
new trustee.

**412.** The resolution appointing any such new trustee shall be registered with the Chief Clerk, and the certificate of the Chief Clerk in respect of the appointment of any such new trustee shall be conclusive evidence of his appointment. (p. 422, *ante*).

Remuneration  
of trustee.

**413.** In cases of liquidation by arrangement, the general meeting called by the debtor may by special resolution declare what remuneration (if any) the trustee shall receive, or they may resolve to leave his remuneration to a subsequent general meeting. (pp. 66, 421, *ante*).

Transfer of  
proceedings to  
another Court.

**414.** In the event of a liquidation by arrangement being resolved upon the creditors assembled at any general meeting may include in such resolution a request that the proceedings shall be conducted in some other district, and thereupon the Judge shall direct accordingly. (p. 424, *ante*).

Sequestration  
occurring during  
liquidation by  
arrangement.

**415.** Where sequestration occurs during the continuance of a liquidation by arrangement the trustee under such liquidation shall pay over and account for to the trustee to be appointed under the sequestration any moneys or property of the debtor which have come to his hands, and in the event of a dividend having been paid to some of the creditors the Court shall make such order for the appropriation thereof as will equalize the distribution of the moneys or property amongst the creditors

who would or should have been entitled thereto under the liquidation proceedings. (p. 427, *ante*). **RR. 415-20.**

**416.** Upon presentation for registration of an extraordinary resolution declaring that the affairs of the debtor are to be liquidated by arrangement and not in insolvency, the Chief Clerk shall examine the same, and may hear any creditor who shall have given him notice of his desire to be heard thereon. The Chief Clerk, being satisfied that the requirements of the Acts and of these Rules have been complied with, shall register the same, making a memorandum thereon, and on the debtor's statement of affairs as follows :—" Registered the                      day of                      , 189 , " and shall seal the same with the seal of the Court. The Chief Clerk shall thereupon deliver to the trustee a certificate in the Form No. 159 in the Appendix. The Chief Clerk shall, when he refuses to register such resolution, certify the grounds of such refusal by memorandum under his hand, and file it with the proceedings. (pp. 422, 424, *ante*).

Registration of resolution.

Certificate of trustee's appointment.

**417.** Neither the extraordinary resolution for liquidation by arrangement, nor the proofs or proxies of creditors assembled at any meeting, shall be objected to or refused by the Chief Clerk by reason of any informality therein, unless he shall be of opinion that such informality is matter of moment, in which event he shall refer the matter to the Judge. (p. 424, *ante*).

Informality not a ground for refusal of resolution.

Reference to Judge.

**418.** The passing of an extraordinary resolution (in the case of liquidation by arrangement) shall be deemed and taken as conclusive evidence that the debtor has complied with the provisions of the Acts with regard to the statement of his affairs required to be submitted to the general meetings of his creditors. The debtor shall, however, at all times render to the trustee every information in his power with reference to his debts and assets, and shall in default be liable to be summoned and examined before the Court thereon. (p. 425, *ante*).

Accuracy of debtor's statement.

Debtor to assist trustee.

**419.** Any creditor or the debtor, if dissatisfied with the registration or non-registration of such extraordinary resolution for liquidation by arrangement (as the case may be), may apply to the Court for a rule calling upon such parties as the Court may think fit to show cause why the registration should not be made or be cancelled, as the case may be. (p. 424, *ante*).

Registration, application to cancel.

**420.** If it shall appear to the Court upon the petition, in the Form No. 162 in the Appendix, of any creditor that he had no notice of the meeting at which the liquidation by arrangement was agreed upon, and

Petition to stay liquidation or composition.

**RR. 420-26.** that he dissents from the liquidation, and that the vote of such creditor would have altered the result arrived at by such meeting, the Court may order that the liquidation be not proceeded with, and if the petitioning creditor's debt be £50 or upwards, may make an order sequestrating the estate. Every such petition shall be heard upon affidavit, and must be presented within 30 days from the date of the meeting at which the liquidation by arrangement was agreed upon (pp. 82, 427, *ante*).

**Proof of debt.** **421.** In the event of a liquidation by arrangement creditors may, after the registration of the said resolution therefor, prove their debts and appoint proxies as under a sequestration. (p. 425, *ante*).

**Costs of arrangement.** **422.** In case of liquidation by arrangement, all proper costs of and incidental to the proceedings prior to the passing of the resolution shall be paid by the trustee out of the estate of the debtor, in like manner and in the like priority as the costs of a petitioning creditor under a petition in insolvency. (pp. 60, 427, *ante*).

**Notices before dividend.** **423.** Seven days at least before declaring any dividend under a liquidation by arrangement a notice shall be gazetted by the trustee in the Form No. 160 in the Appendix, requiring the creditors to send to him their names and addresses and the particulars of their debts or claims, and on declaring a dividend a sufficient reserve shall be made by the trustee for such dividend upon all debts or claims notified to him in pursuance of such notice. The trustee shall also be deemed to have notice of the debts of all creditors whose names are inserted in the debtor's statement of affairs, and (except where any such debt has been adjudicated upon prior to the declaration of the dividend) a similar reserve shall be made in respect thereof. (p. 425, *ante*).

**Proof before dividend.** **424.** All debts must be proved under a liquidation by arrangement prior to the payment of dividend thereon by the trustee. (p. 425, *ante*).

**Rejection of claim to prove.** **425.** Wherever the trustee under a liquidation by arrangement shall reject the claim or proof of any creditor he shall give notice to such creditor by post in the Form No. 161 in the Appendix, and shall be entitled to exclude from dividend any such claimant or creditor whose debt he so rejects, unless such creditor shall, within 21 days from the time at which the trustee's notice should have been delivered to him in the ordinary course of post, apply to the Court to admit his proof, and proceed with such application with due diligence. (p. 425, *ante*).

**What creditors are entitled to dividend.** **426.** Except as before mentioned the trustee shall declare dividends amongst such creditors only as have proved their debts up to the time



of such declaration of dividend, and no creditor who has omitted to prove his debt, or to send to the trustee the particulars of his claim, or whose name does not appear in the debtor's statement, shall be entitled to disturb any such dividend or to make any claim in respect thereof against the trustee, but upon proof of his debt any such creditor shall be entitled to receive the same prior to the payment of any further dividend to the other creditors. (p. 425, *ante*). RR. 426-30.

**427.** The discharge to the debtor shall be in the Form No. 163 in the Appendix, and shall be signed by the requisite proportion of creditors in number and value, or by their agents lawfully authorized. In the case of a corporation, an affidavit shall be filed with the Chief Clerk by the agent signing that he is authorized to sign. In the case of a firm, any partner may sign in the name of the firm on behalf of the firm. Such discharge shall not be presented for signature by the debtor or by any one on his behalf to any creditor, and shall not be signed by any creditor until two months have elapsed from the commencement of the liquidation. (p. 425, *ante*). Discharge of debtor.  
Signature of discharge.

**428.** The discharge, duly signed, shall be presented to the trustee, together with an affidavit by a solicitor, stating that the persons signing such discharge represent three-fourths in number and value of the creditors who have proved debts, and an affidavit of the debtor that such discharge has not been obtained by fraud or by giving any preference to one creditor over another. (p. 425, *ante*). Discharge how verified and dealt with.

**429.** The trustee shall report to the Chief Clerk the discharge of the debtor and file the same together with the affidavits with the Chief Clerk, who shall issue a certificate to the debtor in the Form No. 165 in the Appendix. (p. 425, *ante*). Trustee to file and report discharge.

**430.** (1) A trustee shall submit to the general meeting at which the grant of his release shall be considered a summary of his receipts and payments in the Form No. 93 in the Appendix, verified by his affidavit, and no release shall be granted to a trustee, or, if granted, shall take effect unless such summary so verified shall have been submitted to such meeting; and such summary and affidavit shall be filed with the Chief Clerk. (p. 426, *ante*). Trustee to submit account to general meeting.

(2) The release of a trustee shall not take effect unless and until he has filed the summary and affidavit mentioned in the last preceding rule, and complied with section 59 of the *Insolvency Act* 1897. (p. 426, *ante*).

**RR. 431-36.**Recovery of  
balance of debt.

**431.** Where under section 153 of the Principal Act an application is made to the Court for its sanction to the enforcement by a creditor of the payment of the balance remaining unpaid of a debt proved under the liquidation, the creditor shall file a statement, verified by affidavit, showing the dividend already paid, the balance remaining unpaid, and the property against which he seeks to enforce payment ; and that such property is the property of the debtor, and the Chief Clerk shall thereupon appoint a time and place for the hearing of the application, and notice of the time and place appointed for the hearing shall be served personally on the debtor, or at his usual or last-known place of residence or business. (p. 427, *ante*).

Proceedings at  
hearing of  
application.

**432.** At the hearing of the application service of the notice on the debtor shall be proved, unless he appears, and the Court may hear all persons claiming to be creditors of the debtor before or since the commencement of the liquidation, and make such order in the matter as it thinks fit, or adjourn the hearing for further evidence. (p. 427, *ante*).

Rules for  
sequestration  
to apply to  
proceedings  
under Part IX.  
of the Principal  
Act.

**433.** All the Rules relating to proceedings of every kind under sequestration so far as the same are applicable, and do not conflict with these, and can be applied, shall be deemed to apply to proceedings under Part IX. of the Principal Act. (p. 423, *ante*).

Resolution as to  
composition.

**434.** Where the creditors at the first general meeting duly pass a resolution that a composition shall be accepted in satisfaction of the debts due to them from the debtor, they shall specify in their resolution the amount of the composition, and the instalments and dates at which the same shall be payable, and they may name some person as trustee for receipt and distribution of the composition and any negotiable securities which may be given for the same. (pp. 428, 430, *ante*).

Security for  
composition.

**435.** Instead of specifying by their resolution the security to be given, the creditors may resolve that the composition or some part or instalment thereof shall be secured in such manner as may be approved by a creditor or creditors to be named by the resolution. (p. 428, *ante*).

Deed of  
composition or  
inspectorship.

**436.** The extraordinary resolution may provide that the terms of the composition be embodied in a deed between such parties, and containing such covenants for payment of the composition and for protecting and releasing the debtor, and such other covenants and such provisions for securing the composition either by assignment of property, or by inspection of the debtor's business or otherwise, as the nature of the case may require, and as the resolution may specify in particular or general terms. (p. 429, *ante*).

**437.** (1) Where at the first general meeting a resolution has been passed resolving that a composition shall be accepted in satisfaction of the debts due to the creditors from the debtor, such resolution shall be filed with the statement of the debtor's affairs, proofs and proxies within three days, and another general meeting shall be appointed to be held at an interval of not less than seven days nor more than fourteen days from the date of the meeting at which the resolution was first passed. The second general meeting shall be held at the same place as the first general meeting unless the resolution at such first general meeting shall have otherwise directed. Notice thereof according to Form No. 167 in the Appendix shall be given by the debtor to every creditor in manner provided with respect to first general meetings, with this addition, that the notice to every creditor who was not present or represented at the first general meeting shall be sent by registered post letter. Such notices shall be sent on or before the third day prior to the day on which the second meeting is appointed to be held. (p. 429, *ante*).

**RR. 437-40.**  
Resolution accepting composition to be filed.

(2) The debtor shall also cause notice of the meeting in the Form No. 151 in the Appendix to be advertised in the *Government Gazette* and in one of the Melbourne daily newspapers and also in some local newspaper if the proceedings are not being prosecuted in the Melbourne district seven days before the meeting is to be held. (p. 429, *ante*).

Notice of meeting to be advertised and gazetted.

**438.** At the second general meeting of creditors, the creditors assembled may confirm the resolution passed at the first general meeting, or they may pass an extraordinary resolution that the affairs of the debtor are to be liquidated by arrangement and not in insolvency, or a majority of them may pass a resolution requesting the debtor to surrender his estate under Part III. of the Principal Act. (p. 429, *ante*).

Resolution at second general meeting.

**439.** In every case of a composition in which a trustee is not appointed, or if appointed declines to act, or becomes incapable of acting or is removed, the Court shall have the same power of appointing a trustee for the purpose of receiving and distributing the composition, or for the purpose of carrying out the terms of the composition, as the case may be, as in the case of a vacancy occurring in the office of a trustee in insolvency. (p. 430, *ante*).

Cases in which Official Accountant is to be trustee. (?)

Compare r. 31, *Bankruptcy Rules 1890*.

**440.** Where under a composition a trustee is appointed he shall, after the composition has been approved by the Court, give security in like manner as if he were a trustee in insolvency. If the trustee fail to give such security within seven days after his appointment he may be removed by the Court. (p. 430, *ante*).

Security by trustee under composition.

Compare r. 32, *ibid*.

**RR. 441-46.**

Notice to creditors and advertisement.

Official Accountant may be heard on application.

Creditor may be heard on filing three days' notice of opposition.

Compare r. 21, *Bankruptcy Rules 1890*.

**441.** Notice of the appointment by the Court of the day for considering the composition shall be published in the *Government Gazette*, and in one of the Melbourne daily newspapers, and also in some local newspaper where the debtor last carried on business or resided previous to the institution of the proceedings, if not in Melbourne, not less than fourteen days before the day so appointed, and shall be sent seven days at least before the day so appointed to the trustee and Official Accountant and to every creditor, whether such creditor has proved or not, and the Court may hear the Official Accountant without notice, and may also hear any creditor who has filed in Court three days at least before the day so appointed a notice of his intention to oppose the composition. The debtor and any creditor may without notice be heard in favour thereof. (pp. 195, 431, *ante*).

Costs of application by debtor.

Compare r. 25, *ibid*.

**442.** No costs incurred by a debtor or incidental to an application to approve of a composition shall be allowed out of the estate if the Court refuses to approve the composition. An order approving of a composition shall be in the Form No. 173 in the Appendix, with such variations as circumstances may require. (pp. 60, 431, 432, *ante*).

Correction of formal slips, &c.

Compare r. 29, *ibid*.

**443.** At the time a composition is approved of, the Court may correct or supply any accidental or formal slip, error, or omission therein, but no alteration in the substance of the composition shall be made. (p. 432, *ante*).

Composition to be registered by Chief Clerk after approval.

Compare r. 416, *ante*.

**444.** Where a composition is approved by the Court the Chief Clerk shall register the same, making a memorandum on the extraordinary resolution for composition and on the debtor's statement of affairs as follows:—Registered the                      day of                      18                      , and shall seal the same with the seal of the Court. (p. 430, *ante*).

Default in payment of composition.

Compare r. 33, *Bankruptcy Rules 1890*.

**445.** Where a composition has been approved and default is made in any payment thereunder, either by the debtor or the trustee (if any), no action to enforce such payment shall lie, but the remedy of any person aggrieved shall be by application to the Court. (p. 436, *ante*).

Proof of debts in composition.

Compare r. 37, *ibid*.

**446.** Every person claiming to be a creditor under any composition who has not proved his debt before the approval of such composition shall lodge his proof with the Chief Clerk, and no creditor shall be entitled to enforce payment of any part of the sums payable under a composition unless and until he has proved his debt. (p. 437, *ante*).

PART V.—MISCELLANEOUS MATTERS.

RR. 447-50.

UNCLAIMED FUNDS, ETC., UNDER SECTION 127 OF THE PRINCIPAL ACT, AND SECTION 60 OF THE "INSOLVENCY ACT 1897."

**447.** An application under section 127 of the Principal Act for payment out of the insolvency unclaimed dividend fund of any sum to which any person claims to be entitled shall be supported by the affidavit of the claimant, and such further evidence as the Court may require. (p. 325, *ante*).

Application for payment out by party entitled.  
Compare r. 346, *Bankruptcy Rules* 1886.

**448.** For the purposes of section 127 of the Principal Act, and section 60 of the *Insolvency Act* 1897, the Official Accountant may at any time require the trustee under any insolvency liquidation or composition to submit to him an account, verified by affidavit, of the sums received and paid by him under or in pursuance of any such insolvency liquidation or composition, and may apply to the Court for an order directing the trustee to pay any unclaimed or undistributed moneys arising from the property of the debtor in the hands or under the control of such trustee into the insolvency unclaimed dividend fund, in accordance with the terms of the said sections of the said Acts; the costs of such application shall be in the discretion of the Court. (pp. 193, 326, *ante*).

Accounts by trustees of unclaimed funds.  
Compare r. 73, *Bankruptcy Rules* 1890.

INFORMATION UNDER SECTION 14 OF THE PRINCIPAL ACT AND SECTION 8 OF THE "INSOLVENCY ACT 1897."

**449.** Every information under section 14 of the Principal Act\* and section 8 of the *Insolvency Act* 1897, shall be verified by the affidavit of the informer, and shall be filed together with such affidavit with the Chief Clerk at least fourteen days before the hearing; and an office copy of the information, having a notice at foot thereof as in the Appendix, shall be served upon the party informed against personally, seven days at least before the day of hearing, and the hearing of any such information shall be upon evidence *vidé voce* in open Court, and conducted as nearly as may be as a trial at law. (pp. 25, 383, *ante*).

Information under section 14 of Principal Act and section 8 of the Act 1897.  
Compare r. 129, *Insolvency Rules* 1890.

**450.** Where an insolvent has given bail to attend upon the day appointed for giving judgment upon his application for a certificate of discharge, or has been committed in default of bail if for any reason the Court shall not be prepared to give judgment on the day first appointed, the Court may alter such day, and in such case the insolvent may be again called upon to find bail; in default thereof may be again committed. (pp. 349, 382, *ante*).

Renewal of bail to attend.  
Compare r. 130, *ibid*.

\*The section referred to is repealed by the Act of 1897.

**RR. 451-56.****SCALE OF FEES.**

Scale of fees.

**451.** The scale of fees set forth in the Appendix shall be the fees to be charged for or in respect of proceedings under the Acts, and shall be taken in the Court and in any office connected with the Court. (p. 62, *ante*).

**FALSIFICATION OF DOCUMENTS.**

Falsification of documents.

Compare r. 348, *Bankruptcy Rules 1898*.

**452.** (1) Any person who knowingly falsifies or fraudulently alters any document in or incidental to any proceeding under the Acts or these Rules shall be deemed to be guilty of contempt of Court, and shall be liable to be punished accordingly.

Compare *ibid*.

(2) The penalty imposed by this rule shall be in addition to, and not in substitution for, any other penalty, punishment, or proceeding to which such person may be liable. (p. 27, *ante*).

**NO LIEN ON DEBTOR'S BOOKS.**

No lien on debtor's books.

Compare r. 349, *ibid*.

**453.** No person shall, as against the assignee or trustee, be entitled to withhold possession of the books of account belonging to the debtor or to set up any lien thereon. (p. 218, *ante*).

**NON-COMPLIANCE WITH RULES.**

Non-compliance with Rules.

Compare r. 350, *ibid*.

**454.** Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceeding void unless the Court shall so direct, but such proceeding may be set aside either wholly or in part as irregular or amended, or otherwise dealt with in such manner and upon such terms as the Court may think fit. (p. 3, *ante*).

**ABRIDGMENT OR ENLARGEMENT OF TIME.**

Abridgment or enlargement of time.

Compare r. 351, *ibid*.

**455.** The Court may under special circumstances, and for good cause shown, abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceedings. (p. 48, *ante*).

**MEMORANDUM BY CHIEF CLERK EVIDENCE OF INSERTION OF ADVERTISEMENT.**Memorandum by Chief Clerk evidence of insertion of advertisement. Compare r. 17 (4), *ibid*.

**456.** A memorandum by the Chief Clerk referring to and giving the date of an advertisement in the *Gazette* or a local paper shall be *prima facie* evidence that the advertisement to which it refers was duly inserted in the issue of the *Gazette* or paper mentioned in it.

## STAMPS.

RR. 457-60.

**457.** Every officer of the Court who shall receive any document to which an adhesive stamp shall be affixed, shall immediately upon the receipt of such document deface the stamp thereon, and no such document shall be filed or delivered until the stamp thereon shall be defaced, and it shall be the duty of any person presenting or receiving such document to see that such defacement has been duly made.

Stamps.

Compare r. 59,  
*Bankruptcy*  
*Rules 1888.*

## DUTIES OF EXECUTOR, ETC.

**458.** When the estate of any deceased debtor has been placed under sequestration or adjudged to be sequestrated, it shall be the duty of the executor or legal personal representative of the deceased debtor to lodge with the trustee of such estate (if any) or if none with the assignee forthwith an account of the dealings with and administration of (if any) the deceased's estate by such executor or legal personal representative, and such executor or legal personal representative shall also furnish forthwith a list of the creditors and a statement of the assets and liabilities and such other particulars of the affairs of the deceased as may be required by such trustee or assignee, as the case may be. Every account, list, and statement to be made under this rule shall be verified by affidavit. The expense of preparing, making, verifying, and lodging any account, list, and statement under this rule shall after being taxed be allowed out of the estate upon production of the necessary allocatur. (pp. 78, 95, *ante*).

Duties of  
executor, &c.  
Compare r. 279,  
*ibid.*

**459.** In any case in which the estate of a deceased debtor has been placed under sequestration or adjudged to be sequestrated, and it appears to the Court on the report of the trustee or assignee as the case may be that no executor or legal personal representative exists, the account, list and statement mentioned in the last preceding rule shall be made, verified, and lodged by such person as in the opinion of the Court upon such report may have taken upon himself the administration of or may otherwise have intermeddled with the property of the deceased or any part thereof. (pp. 78, 95, *ante*).

Executor *de son*  
*tort.*  
Compare r. 279,  
*ibid.*

## PERCENTAGES.

**460.** The percentages payable under section 118 of the *Insolvency Act* 1897 shall be paid into the Treasury of Victoria by the trustee. (p. 326, *ante*).

Trustee to pay  
percentages into  
Treasury.

HENRY CUTHBERT.  
HICKMAN MOLESWORTH.  
JAMES JOSEPH CASEY.

# APPENDIX OF FORMS.\*

## PART I.—FORM No. 1.

(General Title.)

The Insolvency Acts.

In the Court of Insolvency.  
District.

In the matter of [*James Brown*] of

Comparisons  
may be made  
generally with  
these forms and  
the Insolvency  
Forms 1890 and  
the Bankruptcy  
Forms 1886 and  
1890.

No. 2.

### DECLARATION OF INABILITY TO PAY.

(Title.)

I, A. B., [*name and description of debtor*] residing at [and carrying  
on business at ] hereby declare that I am unable to pay my debts.

Dated this                      day of                      189                      (Signature)                      A. B.

Signed by the debtor in my presence—

(Signature of witness.)

(Address.)

(Description.)

Filed the                      day of                      189

NOTE.—Where the debtor resides at a place other than his place of business both addresses should be inserted.

No. 3.

### DEBTOR'S PETITION.

(Title.)

The                      day of                      A. D.

I, [*insert name, address, and description of debtor*], lately residing at  
and carrying on business at [*insert the other address or addresses at which unsatis-  
fied debts or liabilities may have been incurred*] having for the greater part of the  
past six months resided at                      and carried on business at

\* NOTE.—Rule 5, *ante*, states :—"The forms in the Appendix where applicable, and where they are not applicable forms of the like character with such variations as circumstances may require, shall be used—where such forms are applicable, any costs occasioned by the use of any other or more prolix forms shall be borne by or disallowed to the party using the same unless the Court shall otherwise direct, provided that the Court or Judge may from time to time alter any forms or substitute new forms in lieu thereof."



within the district, and being insolvent and desirous of surrendering my estate for the benefit of my creditors, hereby petition the Court to accept the surrender of my estate, and to place the same under sequestration.

(Signature)

Signed by the debtor in my presence—

(Signature of witness.)

(Address.)

(Description.)

NOTE.—Where the debtor resides at a place other than his place of business, both addresses should be inserted.

#### No. 4.

#### SCHEDULES AND AFFIDAVITS.

(Title.)

I, A. B., of [name, address, and description] make oath and say as follows :—

1. That the statements contained in my petition herein are true.

2. That I am not an uncertificated insolvent, and that my estate has not previously been sequestrated, save and except on the\* day of in the year

3. That I have not previously compounded with or made any assignment for the benefit of creditors, save and except on the† day of in the year

4. That, save as hereunder appears, I am not a registered proprietor of, and that I have not and am not entitled to any land, lease, mortgage, or other interest under the *Transfer of Land Act 1890*, either in my own right or in right of my wife and also that neither of us has any interest in any such property as aforesaid now under or applied to be brought under the *Transfer of Land Act 1890*.

5. That I have kept books of account, that is to say‡ and no others [or if he has kept none state what documents he has (if any) and of what kind, which will show the state of his affairs.]

6. That I am now in fact insolvent, and that the causes of my inability to pay my debts and to meet my engagements arise from—§

7. That I became unable to pay my debts in due course as they became due, about the , and the cause thereof was [set out cause].

8. That the several papers hereunto annexed, marked severally with the letters A, B, C, D, E, F, and G, contain a true and complete statement, to the best of my knowledge and belief, of the whole of my estate whatsoever and wheresoever in possession or contingency, and of all debts due to and by me, and of all securities for the same, and that I have not wilfully omitted or inserted anything contrary to the truth.

Sworn

\* Here state the date of each previous sequestration.

† Here state the date of each composition or assignment.

‡ Here state name and number of books of account, or that none were kept.

§ Here state the losses, misfortune, or other occurrence that occasioned inability to pay, not the reason for presenting petition.

#### LIST A.

#### List of Debts due to Secured Creditors.

Names, Descriptions, and Abodes of Creditors.	Amount due.	For what due.	On what Day, Month, and Year contracted.*	Nature of Security given.	Value of Security when given.	Date when given.

\* As to transactions more than two months old, day may be omitted.



## LIST D.

*Particulars of the Insolvent's Real Property at, and Two Years prior to, and of Settlements made Five Years prior to date of Petition.*

Situation and Extent of the Property whether freehold or leasehold, in possession or expectancy.	Value.	Whether Mortgaged. If so to whom, and when.	For what Amount.	Value of his Interest if now sold.	Particulars of landed property sold by insolvent within two years prior to date of Petition.	Particulars of all Property settled by the Debtor within five years prior to sequestration, with date and name of Settlee.

## LIST E.

*Particulars of Insolvent's Stock-in-Trade and Other Personal Property.*

	Amount.

## LIST F.

*Particulars of all Debts Due to Insolvent.*

Names, Descriptions, and Abodes of Debtors.	Amount of Debt.	For what due.	What Security (if any).	On what Day, Month, and Year contracted.*	Debts that he believes will be paid on demand when due.	Doubtful debts.	Bad Debts.

\* As to transactions more than two months old, day may be omitted.

LIST G.  
*Balance-Sheet.*

Debts due upon mortgage ... ..			
Debts due to unsecured creditors ... ..			
Debts due to secured creditors ... ..			
Total ... ..			
Value at present of real property ... ..			
Value at present of personal property held as security			
Value at present of personal property not held as security			
Amount of debts due to insolvent which will be paid on demand, as he believes ... ..			
Total ... ..			
Debts total ... ..			
Assets total ... ..			
Deficiency ... ..			

No. 5.

ORDER UPON DEBTOR'S PETITION.

(Title).

The                      day of                      A.D. 189

Upon reading the petition of the above-named A.B., and the affidavits of                      , with the schedule annexed thereto, I do order that the estate of the said A.B. be placed under sequestration in the hands of                      , one of the assignees of insolvent estates.

(Signature)

Judge [or Chief Clerk].

No. 6.

DEBTOR'S SUMMONS.

The Insolvency Acts.

In the Court of Insolvency,  
District.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, and so forth.

To A.B. [or A.B. and C.D.], of

We warn you that, unless within fourteen days after the service of this summons on you, exclusive of the day of such service, you do pay to E.F., of                      , the sum of                      , [and to G.H., of                      , the sum of                      , and so on if more than two creditors], being the sum [or sums] claimed of you by him [or them], according to the particulars hereunto annexed, for [state consideration], or shall compound for the same to his [or their] satisfaction, you will have committed an act of insolvency in respect of which a petition may be presented by the said E.F. [and G.H., &c.] against you, praying that your estate may be sequestrated unless you shall have within the time aforesaid applied to the Court to dismiss this summons on the ground that you are not indebted to him [or them] in the sum claimed, or that you are indebted to him [or them] in a sum less than Fifty pounds.

Given under the seal of the Court this

day of

, 189

Chief Clerk.

(To be Indorsed on Summons.)

YOU ARE SPECIALLY TO NOTE.

That the consequences which will follow any neglect to comply with the requisitions contained in the summons are that your estate may be placed under sequestration on the petition of E.F. [and G.H. &c.] should you not pay to or compound with him [or them] for the sum claimed within fourteen days from the service of this summons on you.

If, however, you are not indebted to the said E.F. [and G.H., &c.] in the sum claimed, or are only indebted to him [or them] in a sum less than Fifty pounds, you must make application to the Court within the like number of days to dismiss this summons, by filing with the Chief Clerk an affidavit stating that you are not so indebted, or only so to a less amount than Fifty pounds, who will thereupon fix a day for the hearing of your application.

L.M., Solicitor suing out this summons, carrying on business at

Or,

This summons is sued out by E.F. [and G.H., &c.] in person.

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No. 7.

## AFFIDAVIT OF SERVICE OF DEBTOR'S SUMMONS.

The Insolvency Acts.

In the Court of Insolvency.  
District.

In the matter of a Debtor's Summons by E.F., of  
[and G.H., of &c.], against A.B. [or A.B. and C.D.],  
of

I, L.M., of , make oath and say :—

1. That I did on the day of 189 , serve the  
above-mentioned A.B. with a copy of the above-mentioned summons, duly sealed  
with the seal of the Court, by delivering the same personally to the said A.B. at

Sworn at, &c.

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L.M.

No. 8.

## SUBSTITUTED SERVICE OF DEBTOR'S SUMMONS.—NOTICE IN GAZETTE.

The Insolvency Acts.

In the Court of Insolvency.  
District.

To A.B. [or A.B. and C.D.], of

In the matter of a Debtor's Summons issued against you by E.F., of  
[and G.H., of &c.]

Take notice that a debtor's summons having been granted against you  
by this Court, the Court has ordered that the publication of this notice in the  
*Victoria Government Gazette* and in a local newspaper shall be deemed to be service  
of such summons on you on the seventh day after the last of such publications.

The summons can be inspected by you on application to this Court.

Dated this day of 189

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Chief Clerk.

No. 9.

## SUBSTITUTED SERVICE OF DEBTOR'S SUMMONS.—NOTICE IN LOCAL PAPER.

The Insolvency Acts.

In the Court of Insolvency.  
District.

To A.B. [or A.B. and C.D.], of

In the matter of a Debtor's Summons issued against you by E.F. of  
[and G.H., of &c.]

Take notice that a Debtor's Summons having been granted against you by this Court, the Court has ordered that the publication of a notice of the granting of the summons in the *Victoria Government Gazette* and in a local newspaper shall be deemed to be service on you of such summons on the seventh day after the last of such publications.

The summons can be inspected by you on application to this Court.

Dated this                      day of                      18                      Chief Clerk.

No. 10.

AFFIDAVIT ON APPLICATION TO DISMISS DEBTOR'S SUMMONS.

The Insolvency Acts.

In the matter of a Debtor's Summons by C.D. [E.F., &c.] against A.B.

I, A.B., of                      , make oath and say :—

That I am not indebted to C.D. [and E.F., &c.] in the [aggregate] amount of the sum claimed in the summons [or that I am only indebted to C.D., or E.F., or G.H.] in the sum of                      , being part of the sum claimed in the summons, or that I am not indebted to C.D. [and E.F., &c.] in such an [aggregate] amount as will justify him [or them] in presenting an insolvency petition against me.

Sworn, &c.

(Signed) A.B.

No. 11.

BOND ON STAY OF PROCEEDINGS.

The Insolvency Acts.

Know all men by these presents, that we, A.B. of, &c., and C.D. of, &c., and E.F. of, &c., are jointly and severally held and firmly bound to L.M. of, &c., in                      pounds to be paid to the said L.M., or his certain attorney, executors, administrators, or assigns. For which payment to be made we bind ourselves and each and every of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this                      day of                      One thousand eight hundred and                     

Whereas the said A.B. having been duly served with a debtor's summons by L.M. of                      in accordance with provisions of the *Insolvency Act 1896*, applied to the said Court to dismiss such summons on the ground that he was not indebted to the said L.M. [or that he was not indebted to him to such an amount as would support a petition for sequestration].

Now, therefore, the condition of this obligation is such that if the above-bounded A.B. or the said C.D. or E.F. shall on demand well and truly pay or cause to be paid to L.M. his attorney, such sum or sums as shall be recovered against the said A.B. by any proceedings taken or continued within twenty-one days from the date hereof in any competent Court by the said L.M. for the payment of the debt claimed by him in the said debtor's summons, together with such costs as shall be given to the said L.M. by such Court, this obligation shall be void, otherwise shall remain in full force.

A.B. (L.S.)

C.D. (L.S.)

E.F. (L.S.)

Signed, sealed, and delivered by the above-bounded                      in the presence of                     

NOTE.—If a deposit of money be made the memorandum should follow the terms of the conditions of the bond.

This form may be adapted to other cases.

## No. 12.

## NOTICE OF SURETIES.

(Title.)

In the matter of a Debtor's Summons by E.F. against A.B.

Take Notice that the sureties whom I propose as my security in the above matter [here state the proceeding which has rendered the sureties necessary] are [here state the full names and descriptions of the sureties and their residences for the last six months, therein mentioning the town, city, places, streets, and numbers, if any].

Dated the                      day of                      18

A.B.

To the Chief Clerk and to L.M. of

## No. 13.

## ORDER ON APPLICATION TO DISMISS DEBTOR'S SUMMONS.

The Insolvency Acts.

In the Court of Insolvency,  
District.

In the matter of a Debtor's Summons by E.F. against A.B.

Upon the application of A.B. to dismiss this summons, and upon reading the affidavit of A.B. and upon hearing E.F. [if present], it is ordered that this summons be dismissed [and that the said E.F. [or as the case may be] shall pay to the said A.B. the sum of                      for costs] [or that the said A.B. enter into a bond in the penal sum of [double the alleged debt (b)] with such two sufficient sureties as the Court shall approve of to pay [or deposit with the Chief Clerk the sum of                      as security for the payment of] such sum or sums as shall be recovered by E.F. [or as the case may be] against the said A.B. in any proceedings taken or continued against him for the recovery of the demand mentioned in such summons, together with such costs as shall be given by the Court in which such proceedings are had.

And it is further ordered that all proceedings on this summons shall be stayed until the Court in which the proceedings shall be taken shall have come to a decision thereon.

Given under the seal of the Court this                      day of                      189

By the Court,

Chief Clerk.

(b) See, as regards the amount of the penal sum in which a bond is to be taken, G.B. 52.

## No. 14.

## CREDITOR'S PETITION.

The Insolvency Acts.

The petition of A.B. [insert name, address, and description of petitioner] of                      praying that the estate of C.D. [insert name, address, and description of debtor] of                      may be sequestrated for the benefit of his creditors.

To His Honour Mr. Justice  
one of the Judges of the Supreme Court of  
the Colony of Victoria [or Judge of the  
Court of Insolvency of the  
District]

SHEWETH—

1. That the said C.D. is now justly and truly indebted to your petitioner [or to your petitioners in the aggregate] in the sum of £                      [set out amount of debt or debts and the consideration].

2. That your petitioner's said debt is wholly unsecured.

Or

That your petitioner holds security for the payment of [or part of] the said sum [but that your petitioner will give up such security for the benefit of the creditors of C.D. in the event of his being adjudged insolvent] [or and your petitioner estimates the value of such security at the sum of £ ].

Or

That E.F., one of your petitioners, holds security for the payment of, &c.

That G.H., another of your petitioners, holds security for the payment of, &c.

3. That the said C.D. has committed an act [or acts] of insolvency within six months before the presentation of this petition.

4. That the act [or acts] of insolvency committed by him was [or were] that [here set out the nature and date or dates of the act or acts of insolvency relied on].

Dated the            day of            18

Your petitioner therefore prays that the estate of the said C.D. may be sequestered for the benefit of his creditors.

Signed by the petitioner in my presence.

(Signed)

A.B.

Signature of witness—

E.F.

Address—

Description—

NOTE.—If there be more than one petitioner, and they do not sign together, the signature of each must be separately attested, e.g., "Signed by the petitioner, A.B., in my presence." If the petition be signed by a firm the partner signing should add also his own signature, e.g., "A.S. and Co., by J. S., a partner in the said firm." If the debtor resides at any place other than the place where he carries on business both addresses should be inserted.

#### INDORSEMENT.

The above-named respondent resides in the

District.

No. 15.

#### CREDITOR'S PETITION FOR SEQUESTRATION OF ESTATE OF DECEASED DEBTOR UNDER SECTION 42 OF THE PRINCIPAL ACT.

##### The Insolvency Acts.

The Petition of, &c.

To His Honour Mr. Justice  
one of the Judges of the Supreme Court of  
the Colony of Victoria [or Judge of the  
Court of Insolvency of the  
district].

SHEWETH—

1. That A.B., late of [residence and occupation], departed this life on the day of 18

2. That the said A.B. made his will, bearing date the            day of 18            which will was proved in the Supreme Court in its probate jurisdiction, on the            day of 18            by C.D. and E.F., of [or as the case may be], the executors therein named [or that the said A.B. died intestate, and letters of administration of his estate and effects were on the            day of 18 granted by the Supreme Court in its probate jurisdiction to G.H., of            ].

3. That the said A.B. at the time of his death was justly and truly indebted to your petitioner [or your petitioners in the aggregate] in the sum of £ [set out amount of debt or debts and the consideration] and his estate is still indebted to the above amount, the said sum of £            being still wholly due and unpaid.

4. That your petitioner's said debt is wholly unsecured [or if secured, as in Form No. 14].

5. That the estate of the said A.B. is according to my information and belief insufficient to pay its debts.



Or

That the creditors of the estate of the said A.B. may be defeated, hindered, or delayed in obtaining payment of the debts due by the said estate unless such estate is sequestrated.

Or

That the said C.D., E.F., or G.H. [as the case may be] in whom the administration of the estate of the said A.B. is legally vested has within six months before the presentation of this petition committed the following act [or acts] of insolvency whereby the creditors of the estate of the said A.B. may be defeated or delayed in obtaining payment of the debts due by the said estate, viz. [here set out the nature and date or dates of the act or acts of insolvency relied on].

Dated this            day of            18

Your petitioner therefore prays that the estate of the said A.B. may be sequestrated for the benefit of the creditors of the said estate.

(Signed)

Witness—

*Indorsement.*

The above-named deceased immediately preceding his decease resided in the            district.

#### No. 16.

##### AFFIDAVIT OF TRUTH OF STATEMENTS IN PETITION.

###### The Insolvency Acts.

In the Matter of the petition, &c., &c.

I,            of            in the colony of Victoria,            the above-named petitioner make oath and say as follows :—

1. That I am the above-named petitioner, and the signature            set and subscribed at the foot of the petition now produced and shown to me, marked with the letter "A," was written and signed by me, and is in my own handwriting.

2. That the above-named            of            is now justly and truly indebted to me in the sum of £            [state consideration], which said sum of £            is now due and owing.

3. That the said debt is wholly unsecured [or that I hold security for the payment of [or part of] the said sum, but that I will give up such security for the benefit of the creditors of            in the event of his being adjudged insolvent] [or and I estimate the value of such security at the sum of £            ].

4. That I am advised and verily believe that the said            has committed an act [or acts] of insolvency within six months before the presentation of the said petition.

5. That the act [or acts] of insolvency committed by him was [or were] [state act or acts].

Sworn, &c.

This affidavit, &c.

#### No. 17.

##### AFFIDAVIT OF TRUTH OF STATEMENTS IN JOINT PETITION.

###### The Insolvency Acts.

In the Matter of the petition of C. D., of            and E. F., of            praying, &c., &c.

We, C.D., of            one of the above-named petitioners, and E.F., of            the other of the above-named petitioners, severally make oath and say—

And first I, the said C. D., for myself say—

1. That I carry on business as a [state business], at            under the style of

2. That I am one of the above-named petitioners, and the signature            set and subscribed at the foot of the said petition was written and signed by me, and is in my own handwriting.

3. That the said A.B. is now justly and truly indebted to me in the sum

of £                      for [state consideration] which said sum of £                      is now due and owing.

4. That my said debt of £                      is wholly unsecured [or that I hold security for the payment of [or part of] the said sum [but that I will give up such security for the benefit of the creditors of                      in the event of his being adjudged insolvent] [or, and I estimate the value of such security at the sum of                      ].

And I, the said E.F., for myself say—

5. That I carry on business as a [state business] at                      under the style of                      6. That I am one of the above-named petitioners, and the signature                      set and subscribed at the foot of the petition now produced and shown to me, marked with the letter "A," was written and signed by me, and is in my own handwriting.

7. That the said A.B. is now justly and truly indebted to me in the sum of £                      for [state consideration] which said sum of £                      is now due and owing.

8. That my said debt of £                      is wholly unsecured [or that I hold security for the payment of [or part of] the said sum but that I will give up such security for the benefit of the creditors of                      in the event of his being adjudged insolvent] [or and I estimate the value of such security at the sum of £                      ].

And we, the said C.D. and E.F., for ourselves jointly and severally say—

9. That we are advised and verily believe that the said A.B. has committed an act [or acts] of insolvency within six months before the presentation of the said petition.

10. That the act [or acts] of insolvency committed by him was [state act or acts of insolvency].

Sworn, &c.

C.D.  
E.F.

This affidavit, &c.

No. 18.

#### ORDER NISI ON CREDITOR'S PETITION.

##### The Insolvency Acts.

In the Matter of the petition of                      of                      praying that the estate of                      of                      may be sequestrated for the benefit of his creditors.

Before His Honour Mr. Justice                      one of the Judges of the Supreme Court of the colony of Victoria [or Judge of the Court of Insolvency of the                      District].

Upon reading the petition of the above-named petitioner this day presented to me                      as one of the Judges of the Supreme Court of the colony of Victoria [or Court of Insolvency], setting forth that the above-named C.D., of                      is now justly and truly indebted to the said petitioner in the sum of £                      [set out amount of debt or debts and the consideration as in petition] which said sum of £                      is now due and owing, and that the petitioner's said debt is wholly unsecured [or that the petitioner holds security for the payment of [or part of] the said sum, but that your petitioner will give up such security for the benefit of the creditors of C.D. in the event of his being adjudged insolvent] [or and your petitioner estimates the value of such security at the sum of £                      ] [or that the said petitioner E.F. holds security for the payment of, &c.] [or that the said petitioner G.H. holds security for the payment of, &c.] and that the said C.D. has committed an act [or acts] of insolvency within six months before the presentation of the said petition, and that the act [or acts] of insolvency committed by him was [or were] [here set out the nature and date or dates of the act or acts of insolvency as in petition]. And praying that the estate of the said C.D. may be sequestrated for the benefit of his creditors. And upon reading the several affidavits of                      and                      respectively sworn and filed herein and the allegations contained in the said petition having been proved to my satisfaction I do by this order under my hand place the estate of the said C.D. under sequestration in the hands of                      Esq. one of the assignees of insolvent estates until this order shall be made absolute or be discharged as mentioned in and provided by the Insolvency Acts. And I do appoint Thursday the                      day of                      18                      at the hour of Eleven o'clock in the forenoon, at the Supreme Court House, situate in William-

**street in the city of Melbourne, in the colony of Victoria, as the time and place when cause may be shown before the said Supreme Court against this order being made absolute.**

Given under my hand this                      day of                      18                      at                      of the  
                    clock in the                      noon.

**Y.Z.,**

**One of the Judges of the Supreme Court of the Colony of Victoria  
[or Judge of the Court of Insolvency of the District.]**

No. 19.

## ORDER ENLARGING ORDER NISI.

## The Insolvency Acts.

**In the Supreme Court of the Colony of Victoria.**

### Insolvency Jurisdiction.

**In the Matter of the petition of, &c., &c.**

day, the                      day of                      18

Before His Honour Mr. Justice

Upon reading the petition and order nisi in this matter, and upon hearing Mr. G.H., of counsel for the said respondent, and Mr J.K., of counsel for the above-named petitioner, this Court, on application of the said [petitioner or respondent], doth order that the said order nisi be and the same is hereby enlarged until  
day, the            day of            18

**By the Court,**

**Associate.**

**No. 20.**

**AFFIDAVIT OF SERVICE OF ORDER NISI.**

## The Insolvency Acts.

**In the Supreme Court of the Colony of Victoria.**

### **Insolvency Jurisdiction.**

**In the Matter of the petition, &c., &c.**

I, L.M., of                      make oath and say as follows :—

1. That Mr. \_\_\_\_\_ is the solicitor in this matter for the above-named petitioner.

2. That I did on                      day, the                      day of                      18                      serve the order nisi made in this matter by His Honour Mr. Justice                      as one of the Judges of the Supreme Court of the colony of Victoria [or Judge of the Court of Insolvency of the                      District] on the                      day of                      18                      personally on the above-named respondent                      by delivering to him personally at                      an office copy of the said order nisi signed and certified by                      Esq., Associate to His Honour Mr. Justice                      [or                      Esq., Chief Clerk of the Court of Insolvency of the                      District.]

Sworn, &c.

**This affidavit, &c.**

**No. 21.**

### ORDER FOR SUBSTITUTED SERVICE OF ORDER NISI.

## The Insolvency Acts.

**In the Matter of the petition, &c., &c.**

**Before His Honour Mr. Justice**

Upon reading the affidavit of \_\_\_\_\_ sworn and filed in this matter, and it being proved to my satisfaction that the above-named respondent is keeping out of the way to avoid service [or has left Victoria], I do order that service of office copies of the order *nisi* made in this matter [or and of the order enlarging the same] and of this order at the usual or last-known place of abode or business of the said \_\_\_\_\_ situate at \_\_\_\_\_ by delivering the same to some adult

## APPENDIX OF FORMS TO INSOLVENCY RULES 1898.

person resident thereat, or if such person will not receive the same or if there be no such person by affixing such copies upon some conspicuous place upon the premises shall be deemed good service of the said order nisi [or and order enlarging same] and of this order upon the said                      and I do fix within                      days after service of the said order nisi as the time within which the said                      may file or post a notice of objections.

Given under my hand this                      day of                      18

X.Y.,

One of the Judges of the Supreme Court of the Colony of Victoria [or Judge of the Court of Insolvency of the                      district.]

## No. 22.

## NOTICE BY DEBTOR OF INTENTION TO OPPOSE ORDER NISI BEING MADE ABSOLUTE.

The Insolvency Acts.

In the Supreme Court of the Colony of Victoria.

Insolvency jurisdiction.

In the Matter of the petition of, &c.

I, the above-named                      do hereby give you notice that I intend to oppose the order nisi made in this matter on the                      day of                      18                      being made absolute, and that I intend to dispute the petitioning creditor's debt [or the act of insolvency, or as the case may be], and that I will rely upon all objections appearing on the face of the proceedings.

Dated this                      day of                      18

The above-named Respondent.

To                      Esq.,

Associate of His Honour Mr. Justice

## No. 23.

## ORDER ABSOLUTE.

The Insolvency Acts.

In the Supreme Court of the Colony of Victoria.

Insolvency jurisdiction.

In the Matter of the petition of, &c.

day, the                      day of                      18

Before His Honour Mr. Justice

Upon reading the order nisi in this matter dated the                      day of                      18 under the hand of                      Esq., one of the Judges of the Supreme Court of the colony of Victoria [or Judge of the Court of Insolvency of the                      District] made upon the petition of the above-named                      placing the estate of the above-named                      under sequestration in the hands of                      Esq., one of the assignees of insolvent estates until the said order should be made absolute or be discharged as mentioned in and provided by the Insolvency Acts. And the notice dated the                      day of                      18                      , of intention to oppose the said order nisi being made absolute given and filed by the said respondent in this matter [or the affidavit of                      sworn and filed herein of the service of the said order nisi on the respondent] and upon hearing the *riâd voce* evidence of [names of witnesses examined] and the exhibits put in in such evidence read and what was alleged by Mr.                      of counsel for the said petitioners and by Mr.                      of counsel for the said respondent [or upon hearing Mr.                      of counsel for the said petitioner and the respondent not appearing and no notice of opposition having been given] this Court doth order that the said order nisi dated the                      day of                      18 be and the same is hereby made absolute, and the estate of the said                      is hereby adjudged to be sequestrated.

By the Court,

Associate.

## No. 24.

## ORDER DISCHARGING ORDER NISI.

## The Insolvency Acts.

In the Supreme Court of the Colony of Victoria.

In the Matter of the petition of, &c.  
day, the day of 18  
Before His Honour Mr. Justice

Upon reading the order nisi in this matter dated the day of 18 under the hand of His Honour Mr. Justice one of the Judges of the Supreme Court of the Colony of Victoria [or Judge of the Court of Insolvency of the District] made upon the petitioner of the above-named placing the estate of the above-named under sequestration in the hands of Esq., one of the assignees of insolvent estates, until the said order should be made absolute or be discharged as mentioned in and provided by the Insolvency Acts. The notice of objections, dated the day of 18 given and filed by the respondent in this matter.

And upon hearing the *vidæ voce* evidence of the said and the exhibits put in in such evidence read and what was alleged by Mr. of counsel for the said respondent and by Mr. of counsel for the said petitioner.

This Court doth order that the said order nisi, dated the day of 18 be, and the same is hereby discharged with costs. And this Court doth further order that it be referred to the proper taxing officer of this Court to tax the costs of the said respondent of and occasioned by the said order nisi and of this order, and that such costs when so taxed be forthwith paid by the said to the said or to Mr. his solicitor.

By the Court,

Associate.

## No. 25.

## APPLICATION TO BE REGISTERED UNDER SECTION 17 OF THE INSOLVENCY ACT 1897.

## The Insolvency Acts.

In the Court of Insolvency,  
District.

In the Matter of the application of to be registered under section 17 of the *Insolvency Act* 1897 as qualified to be appointed to the office of Trustee under the Insolvency Acts.

I, the undersigned hereby make application to this honorable Court to be registered as qualified to be appointed to the office of trustee under the Insolvency Acts.

Dated the day of 18  
(Signed) of

## No. 26.

## ADVERTISEMENT FOR "GAZETTE" AND LOCAL NEWSPAPER BY PERSON APPLYING TO BE REGISTERED UNDER SECTION 17 OF THE INSOLVENCY ACT 1897.

## The Insolvency Acts.

Take notice that I of intend to apply to the Court of Insolvency at on the day of 18 at of the clock in the noon, to be registered as qualified to be appointed to the office of trustee under the Insolvency Acts, pursuant to sub-section (1) of section 17 of the *Insolvency Act* 1897.

Dated the day of 18

Signature.

NOTE.—Any person may without notice oppose the application.

N.B.—The notice to the Official Accountant will be in the same form, addressed as follows :—"To Esq., the Official Accountant."

## APPENDIX OF FORMS TO INSOLVENCY RULES 1898.

## No. 27.

## ORDER FOR REGISTRATION OF A PERSON UNDER SECTION 17 OF THE INSOLVENCY ACT 1897.

## The Insolvency Acts.

In the Court of Insolvency.

District.

In the Matter of the application of A.B., of \_\_\_\_\_ to be registered under section 17 of the *Insolvency Act* 1897 as qualified to be appointed to the office of trustee under the Insolvency Acts.

Upon the application of the above-named \_\_\_\_\_ and upon reading the advertisements by the said A.B. in the *Gazette* and \_\_\_\_\_ newspapers, and the affidavit of \_\_\_\_\_ of due notice of the said application having been given to the Official Accountant, and no one appearing to oppose the said application [or, upon hearing \_\_\_\_\_ of counsel for the applicant, and Mr. \_\_\_\_\_ of counsel for \_\_\_\_\_] it is ordered that the said \_\_\_\_\_ be registered as qualified to be appointed to the office of trustee under the Insolvency Acts.

Given under the seal of the Court this \_\_\_\_\_ day of \_\_\_\_\_ 18

By the Court,

Chief Clerk.

## No. 28.

## FORM OF REGISTER BOOK OF REGISTRATION OF TRUSTEES UNDER SECTION 17 OF THE INSOLVENCY ACT 1897.

Court.	Trustee's Name.	Address.	Date of Application.	Date of Order for Registration.	Date of Registration.	Date of Order for Cancellation.	Date of Cancellation.

## No. 29.

## NOTICE OF APPOINTMENT BY CREDITORS OF A PERSON IN RESPECT OF A PARTICULAR ESTATE.

## The Insolvency Acts.

In the Court of Insolvency,

District.

In the Matter of A.B., of \_\_\_\_\_

an insolvent.

To the Court of Insolvency

of the \_\_\_\_\_ District.

C.D., of \_\_\_\_\_ by this writing under his hand hereby informs this honorable Court that he was on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_ duly appointed by the creditors to fill the office of trustee of the property of the above-named insolvent.

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 18

(Signed)

of \_\_\_\_\_

## No. 30.

ORDER FOR REGISTRATION OF A PERSON UNDER SECTION 18 OF THE  
INSOLVENCY ACT 1897.

## The Insolvency Acts.

In the Court of Insolvency,  
District.

In the Matter of A.B., of an insolvent.

Upon the application of C.D., and upon reading the information in writing to the Court by the said C.D. of his appointment by the creditors of the above-named insolvent to be the trustee of the property and estate of the said insolvent, and the said insolvent's schedule: It is ordered that the said C.D., upon giving security by bond to the Official Accountant in the sum of with two sufficient sureties to be approved of by the Chief Clerk conditioned for the faithful and sufficient performance and execution from time to time of all and singular the duties required of him as trustee by the Insolvency Acts or any Rule of Court made or hereafter to be made under such Acts be registered as qualified to be appointed to the office of trustee under the Insolvency Acts in respect of the estate and property of the said insolvent.

Given under the seal of the Court this                      day of                      18  
By the Court,                      Chief Clerk.

## No. 31.

FORM OF REGISTER BOOK OF REGISTRATION OF TRUSTEES UNDER SECTION 18 OF  
THE INSOLVENCY ACT 1897.

Insolvent's Name.	Court.	Trustee's Name.	Address.	Date of Appointment.	Date of Order for Registration.	Date of Registration.	Date of Order for Cancellation.	Date of Cancellation.

## No. 32.

## BOND OF TRUSTEE.

Know all men by these presents that we, A.B., of &c., and C.D., of &c., and E.F., of &c., are held and firmly bound to the Official Accountant of the Court of Insolvency, his successors, and assigns, in the sum of £ [if general £2,000] to be paid to the said Official Accountant, his successors and assigns. For which payment we bind ourselves and each of us and any two of us and the heirs executors and administrators of us and of each of us and of any two of us jointly and severally by these presents.

Sealed with our seals.

Dated this                      day of                      189 .

[If special security: Whereas on the                      day of                      189 the estate of G.H., of &c., was placed under sequestration [or as the case may be] under the Insolvency Acts: And whereas the said A.B. was appointed and has been duly registered Trustee of the property of the [Insolvent] [or as the case may be] or whereas the said A.B. has been appointed Trustee of a Deed of Arrangement dated the                      day of                      189 made or entered into by G.H., of &c.]

[If general security: Whereas the said A.B. is registered under the *Insolvency Act 1897* as qualified to be appointed to the office of Trustee under the Insolvency Acts: And whereas the said A.B. is desirous of giving security to be available for any matter under the Insolvency Acts in which the said A.B. may be appointed or elected as Trustee.]

Now therefore the condition of this Bond or Obligation is such that if the said A.B. shall and do from time to time well and sufficiently perform and execute all and singular the duties required of him as Trustee by the Insolvency Acts or any Rule of Court made or hereafter to be made this obligation shall be void or otherwise shall remain in full force and virtue.

Signed, sealed, and delivered by the above bounden in the presence of—

A.B., (L.S.)  
C.D., (L.S.)  
E.F., (L.S.)

NOTE.—If a deposit of money be made the memorandum thereof should follow the terms of the condition of the Bond.

No. 33.

#### AFFIDAVIT OF JUSTIFICATION BY SURETY.

##### The Insolvency Acts.

In the Court of Insolvency.  
District.

In the matter of A.B. [or in the matter of the Insolvency Acts and the Insolvency (Trustee's Security) Rules 1898.]

I, C.D., of  
one of the sureties for  
make oath and say

1. That I am a householder [or as the case may be] residing [describing particularly the town or city, the street or place, and the number of the house, if any.]

2. That I am worth property to the amount of £ [the amount required] over and above what will pay my just debts [if security for any other purpose or in any action add—"and every other sum for which I am now security."]

3. That I am not bail or security in any other matter, action, or proceeding, or for any other person [or if security in any other matter or action add—"except for in the matter of E.F. or for G.H. at the suit of J.K. in the Court of in the sum of £" (specifying the several matters and actions with the courts in which they are brought and the sums in which he has become bound.)]

4. That my property to the amount of the said sum of £ [and if security in any other matter, action, &c.—"over and above all other sums for which I am security as aforesaid"] consists of [here specify the nature and value of the property in respect of which the deponent purposes to become bondsman as follows:—"Stock in trade in my business of carried on by me at of the value of £ of good book debts owing to me to the amount of £ of furniture in my house at of the value of £ of a freehold [or leasehold] farm of the value of £ situate at occupied by or of a dwelling house of the value of £ situate at occupied by," or of other property (particularizing each description of property with the value thereof).]

5. That I have for the last six months resided at [describing the place of such residence, or if he has had more than one residence during that period state it in the same manner as above directed.]

Sworn, &c.

This affidavit, &c.

No. 34.

#### ACCEPTANCE OF OFFICE OF TRUSTEE.

(Title.)

I hereby accept the office of trustee of the estate of the above-named

Dated the day of 18

Witness—

No. 35.

#### FORM OF ORDER CONFIRMING TRUSTEE.

(Title).

Upon reading the acceptance in writing of C.D., of the office of trustee of the estate of the above-named A.B., and it appearing that the said C.D. has been duly registered, and has given the requisite security: It is ordered that the [election or appointment, as the case may be] of the said C.D. in the place of E.F., the assignee named in the order of sequestration [or of , the former trustee], be confirmed.

(Given under the seal of the Court, this day of 189

By the Court,

Chief Clerk.



## No. 36.

## NOTICE OF GAZETTE OF THE APPOINTMENT OF TRUSTEE.

Notice is hereby given that I \_\_\_\_\_ of \_\_\_\_\_, in the colony of Victoria have been duly appointed to fill the office of trustee of the property of the above-named insolvent, and that such appointment was duly confirmed by order of the Court of Insolvency, at Melbourne, made on the \_\_\_\_\_ day of \_\_\_\_\_ instant. All persons having in their possession any of the effects of the insolvent must deliver them to me as such trustee, and all debts due to the insolvent must be paid to me as such trustee. Creditors who have not yet proved their debts must forward their proofs of debts to me as such trustee.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_

## No. 36A.

## NOTICE OF GAZETTE OF THE REMOVAL OF TRUSTEE.

In the Court of Insolvency.  
District.

G.H., of \_\_\_\_\_ has by order of this Court dated the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_ been removed from his office of Trustee of the property of A.B., C.D., or &c.  
Dated this \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_

\_\_\_\_\_  
Chief Clerk.

## No. 37.

CASH BOOK.  
(Pro Formd.)

Dates.	Receipts or Payments.	State of Bank Account.			State of Trustee's Account.		
		£	s.	d.	£	s.	d.
1890. August 14	Dr. Received cash on insolvent's desk ... ..	...			5	0	0
" "	" Received balance on insolvent's deposit account ..	...			39	14	6
" "	Cr. Paid into bank account ...	44	14	6	44	14	6
" " 20	Dr. Received arrears of rent due by Jas. Johnstone ... £25 0 0						
" "	" Half-year's rent to Christmas from ditto ... 17 10 0						
" "	" Ditto from Wm. George for shop... 27 10 0						
" "	" Ditto from John Williams for cellar 5 0 0						
" "	Cr. Paid into bank ... ..	75	0	0	75	0	0
" " 30	Dr. Received from John Thompson debt due by him ... £75 16 8						
" "	" Received from William Jones ditto ... 5 2 6						
" "	Cr. Paid into bank ... ..	80	19	2	80	19	2
" "	Carried forward ... ..	200	13	8			

## APPENDIX OF FORMS TO INSOLVENCY RULES 1898.

## CASH BOOK—continued.

(Pro Formd).

Dates.	Receipts or Payments.	State of Bank Account.	State of Trustee's Account.
		£ s. d.	£ s. d.
1890. August 31	Brought forward ... .. Dr. Received proceeds of household furniture sold by J. Williams, auctioneer ... ..	200 13 8 ...	150 8 4
" "	Cr. Paid into bank ... ..	200 13 8 150 8 4	150 8 4
" September 3	Dr. Received dividends on gasshares payable on 25th March, 1890 ... £3 0 0 " Price of gasshares sold ... .. 126 0 0	351 2 0 ...	129 0 0
" "	Cr. Paid into bank ... ..	129 0 0	129 0 0
" " 16	Dr. Received from Thomas Thomson, amount of debt due by him ... ..	...	8 2 4
" "	Cr. Paid into bank ... ..	8 2 4	8 2 4
" " 30	Dr. Received per draft on bank account ... ..	488 4 4 20 0 0	20 0 0
" "	Cr. Paid to account of allowance to insolvent ... ..	488 4 4 ...	20 0 0
" October 2	Dr. Received per draft on bank account ... ..	9 6 0	9 6 0
" "	Cr. Paid rates and taxes ... ..	458 18 4 ..	9 6 0
" November 1	Dr. Received per draft on bank account ... ..	458 18 4 30 4 0	30 4 0
" "	Cr. Paid allowance to insolvent ... £13 12 0 " Law expenses and miscellaneous charges ... .. 16 12 0	428 14 4 ...	30 4 0
Balance in bank at 14th November, 1890 (date of audit), exclusive of interest from commencement of account to be ascertained at the end of the year ...		428 14 4	
Balance in the trustee's hands at 14th November, 1890		..	
Add balance in bank as above ... ..		...	
Total balance of assets realized in favour of the estate as at 14th November, 1890 ... ..		...	428 14 4

(Signed) G. H., Trustee.



## APPENDIX OF FORMS TO INSOLVENCY RULES 1898.

**No. 39.**

**In the Court of Insolvency,  
District.**

In the Estate of \_\_\_\_\_, of \_\_\_\_\_, in the colony of Victoria,  
 \* \_\_\_\_\_ STATEMENT OF ASSETS AND RECEIPTS FROM THE \_\_\_\_\_ DAY  
 OF 189\_\_\_\_\_, TO THE \_\_\_\_\_ DAY OF 189\_\_\_\_\_

Assets.			Receipts.			
<b>Assets shown in Schedule or Statement of Affairs or which have come to the knowledge or possession of Trustee.</b>	<b>If realized or still outstanding.</b>	<b>Gross Amount for which realized.</b>	<b>Date.</b>	<b>Item.</b>	<b>For what.</b>	<b>Amount.</b>
				Deduct disbursements for above period . . . .		
				Balance in hand &		

• Here state whether a "Final" or "Interim" Statement.

**In the Court of Insolvency,  
District.**

In the Estate of \_\_\_\_\_, of \_\_\_\_\_ in the  
colony of Victoria.

IN THE COURT OF INSOLVENCY,  
DISTRICT.

I (We), \_\_\_\_\_, of \_\_\_\_\_, in the colony of Victoria, assignee (or trustee or trustees) of the estate of the abovenamed insolvent, make oath and say that the within statement contains a true and correct account of all assets which have come to my [or our] possession or knowledge or to the possession of any one on my [or our] behalf in the said estate and of all receipts in the said estate between the dates as set forth in the heading thereof; and that I [or we] have not omitted anything therefrom or inserted anything therein contrary to the truth.

Sworn at                      in the colony }  
of Victoria, this                      }  
day of                      A.D. 189                      }  
before me—

**A Commissioner of the Supreme Court of the colony of Victoria for taking Affidavits.**

In the Estate of  
of  
in the colony of Victoria.

**STATEMENT OF ASSETS AND RECEIPTS.**

## No. 40.

NOTICE OF MEETINGS UNDER SECTION 53 OF THE PRINCIPAL ACT FOR  
GOVERNMENT GAZETTE.In the Court of Insolvency,  
District.

Notice is hereby given that the estates of \_\_\_\_\_ have been sequestrated, and that general meetings of creditors in the said estates will be holden at the Insolvency Court Offices situate at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ A.D. 189\_\_\_\_, at the hour of half-past Ten o'clock in the forenoon, for the election of trustees and for the other purposes mentioned in the 53rd section of the *Insolvency Act* 1890.

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ A.D. 189\_\_\_\_  
\_\_\_\_\_  
Chief Clerk.

## No. 41.

NOTICE TO CREDITORS OF MEETING UNDER SECTION 53 OF THE PRINCIPAL ACT.  
(Title.)

Under Order of Sequestration dated the \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_\_\_  
Notice is hereby given that a general meeting of creditors in the above matter will be held at the Insolvency Court Offices situate at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_\_\_, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon.  
To entitle you to vote thereat your proof must be lodged with me not later than twenty-four hours before the time fixed as aforesaid for holding the said meeting. Proxies to be used at the meeting must be lodged with me not later than Four o'clock on the day before the said meeting.

Assignee.

## NOTE.

At the above general meeting the creditors may amongst other things—

1. By resolution appoint some fit person [or persons] not exceeding two, whether creditors or not, to fill the office of trustee of the property of the insolvent at such remuneration (if any) as the creditors may determine or resolve to leave his appointment to the committee of inspection.
2. By resolution appoint a committee of inspection.
3. By resolution give directions as to the manner in which the property is to be administered by the trustee.

## No. 42.

AFFIDAVIT OF POSTAGE OF NOTICES—MEETING UNDER SECTION 53 OF THE  
PRINCIPAL ACT.

(Title.)

I, \_\_\_\_\_ of \_\_\_\_\_, a clerk in the office of \_\_\_\_\_  
assignee of the estate of the above-named \_\_\_\_\_ make oath and say as follows:—

1. That I did on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_ send to each creditor mentioned in the insolvent's schedule a notice of the time and the place of the general meeting of creditors to be held under section 53 of the *Insolvency Act* 1890 in the form hereunto annexed marked A.
2. That such notices were addressed to the said creditors respectively according to their respective names and addresses appearing in the insolvent's schedule.
3. That I sent the said notices by putting the same into the post-office at \_\_\_\_\_ before the hour of \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon on the said day.

Sworn, &amp;c.

## No. 43.

## ORDER OF TRANSFER OF PROCEEDINGS.

(Title.)

The \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_\_\_

## APPENDIX OF FORMS TO INSOLVENCY RULES 1898.

Whereas the estate of the above-named \_\_\_\_\_ was by order dated the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_ sequestrated [or by orders *nisi* and *absolute* dated respectively the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_ and the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_ adjudged to be sequestrated, *as the case may be*] and a request in writing of the majority in number of creditors who have proved debts [or of the assignee or trustee] has been presented to me under section 9 of the Principal Act. I do order that all proceedings [or *such part of the proceedings naming them*] in the above-named matter be transferred from the district of [Ballarat, or as the case may be] to the district of [Melbourne, or as the case may be.]

(Signed by)

Judge of the Court of Insolvency.

## No. 44.

ORDER TO INSOLVENT TO ATTEND AND BE EXAMINED, OR TO ATTEND A MEETING OF CREDITORS UNDER SECTION 128 OF THE PRINCIPAL ACT.

The Insolvency Acts.

In the Court of Insolvency.

District.

In the Matter of A.B., of \_\_\_\_\_ an insolvent

Upon reading [insert materials if any] this Court doth order that the said A.B. do attend and be examined [or *as the case may be*] at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ o'clock.

Given under the seal of the Court this \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_

By the Court,

Chief Clerk.

## No. 45.

APPLICATION BY ASSIGNEE OR TRUSTEE FOR AN EXAMINATION SITTING UNDER SECTION 134 OF THE PRINCIPAL ACT.

(Title).

The Insolvency Acts.

In the Court of Insolvency.

District.

In the matter of, &amp;c.

An order of sequestration [or adjudication of sequestration] having been made in the above matter \_\_\_\_\_ application is hereby made to the Court by the assignee [or trustee] for an order appointing the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_ at \_\_\_\_\_ or such other time and place as the Court shall direct for holding an Examination Sitting of the Court, and that the debtor do attend such sitting.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_

Trustee.

## No. 46.

ORDER UNDER SECTION 134 OF THE PRINCIPAL ACT.

The Insolvency Acts.

In the Court of Insolvency,

District.

In the Matter of A.B., of \_\_\_\_\_, an insolvent.

Whereas on the application in writing of the [assignee or trustee] of the estate of the above-named A.B., an Examination Sitting of the Court has been appointed in the estate of the said A.B., this Court doth order that the said A.B. do attend at \_\_\_\_\_ at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon on the \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_, the time and place appointed for such sitting, and if the said A.B. does not attend the said sitting or any adjournment thereof, having no lawful

impediment made known to and allowed by the Court, he will be deemed guilty of contempt of this Court and will be punished accordingly.

Given under the seal of the Court this                      day of                      189

By the Court,

Chief Clerk

[*N. B.—If he is required to produce any documents in his custody or power, the order should specify them with reasonable certainty.*]

—  
No. 47.

NOTICE OF DAY OF EXAMINATION SITTING UNDER SECTION 134 OF THE PRINCIPAL ACT (FOR GAZETTE AND NEWSPAPER).

(Title.)

Notice is hereby given that the above-named Court has appointed                      day the                      day of                      18, at                      o'clock in the                      noon for holding an Examination Sitting of the said Court in the estate of the above-named, and the said Court has ordered the debtor to attend such sitting for the purpose of being examined on oath by the trustee or any creditor as to his trade, dealings, and estate.

Dated the                      day of                      18

(Signed)

[Trustee or Assignee.]

—  
No. 48.

REQUEST IN WRITING UNDER SECTION 135 OF THE PRINCIPAL ACT.

The Insolvency Acts.

In the Court of Insolvency  
District.

In the Matter of A.B., of

I hereby request that a summons under section 135 of the Principal Act may issue for the examination of [*name persons.*].

Dated the                      day of                      189

K.I.,  
[Assignee or Trustee].

—  
No. 49.

SUMMONS UNDER SECTION 135 OF THE PRINCIPAL ACT.

The Insolvency Acts.

In the Court of Insolvency  
District.

In the Matter of A.B., of                      , an insolvent.

To X.Y., of

Whereas the [*trustee or assignee as the case may be*] has applied to this Court for a summons under section 135 of the *Insolvency Act 1890*.

You are hereby required to attend at the Court House at                      on the day of                      18, at                      o'clock in the                      noon, to be examined in the above matter, under the provisions of the said section of the said Act, and then and there to have and produce :\* hereof if you fail, having no lawful impediment to be then made known to the Court and allowed by it, the Court may by warrant cause you to be apprehended and brought up for examination.

Given under the seal of the Court the                      day of                      189

By the Court,

Chief Clerk.

\*State any particular documents required, e.g., all ledgers and books of account, invoices, statements of account, letters, books, papers, and documents of every kind in any matter relating to your dealings and transactions, or any of them, with                      an insolvent.

## No. 50.

APPOINTMENT OF SHORTHAND WRITER TO TAKE EXAMINATION OF DEBTOR  
OR WITNESS.

(Title.)

Upon the application of the trustee [or assignee] the Court hereby appoints  
of in the Colony of Victoria to take  
the examination of the said at his examination this day pursuant  
to Rule 79 of the General Rules under the above Acts.

Given under the seal of the Court this day of 18

By the Court,  
Chief Clerk.

## No. 51.

## DECLARATION OF SHORTHAND WRITER.

(Title.)

I, of , in the Colony of Victoria, the Shorthand  
Writer appointed by this Court to take down the examination of the said  
[or of C.D. as the case may be], do solemnly and sincerely declare  
that, I will truly and faithfully take down the questions and answers put and  
given by the said in this matter, and will deliver true and faithful  
transcripts thereof as the Court may direct.

Dated this day of , 18

(Declared before me at the time and place above mentioned)  
Chief Clerk.

## No. 52.

NOTES OF EXAMINATION OF DEBTOR OR WITNESS WHERE A SHORTHAND WRITER  
IS APPOINTED.

(Title.)

Examination of the Debtor [or of C.D. as the case may be].

Before His Honour Judge , at the Court of Insolvency of the  
District, this day of 18

The above-named debtor [or C.D. as the case may be], being sworn and examined  
at the time and place above mentioned, upon the several questions following being  
put and propounded to him, gave the several answers thereto respectively follow-  
ing each question, that is to say:—

These are the notes of the examination of , taken before me  
this day of 18

Judge of the Court of Insolvency of the District.

## No. 53.

NOTES OF EXAMINATION OF DEBTOR OR WITNESS WHERE SHORTHAND WRITER  
IS NOT APPOINTED.

(Title.)

Examination of the Debtor [or C.D. as the case may be].

Before His Honour Judge , at the Court of Insolvency,  
of the District, this day of 18

The above-named debtor [or C.D. as the case may be] being sworn and examined  
at the time and place above mentioned, upon his oath saith as follows:—

These are the notes of the examination of , taken before me this  
day of 18

Judge of the Court of Insolvency of the District.



## No. 54.

ORDER AS TO EXAMINATION OF DEBTOR WHO IS SUFFERING FROM MENTAL OR  
PHYSICAL AFFLICTION OR DISABILITY.

(Title.)

Upon the application of the trustee [or assignee] [or of\* , of ] in the above matter, and upon reading , and upon hearing , and it appearing to the Court that the debtor is suffering from physical disability which makes him unfit to attend an examination in Court [or as the case may be] it is ordered that instead of a public examination of the debtor † the debtor be examined on oath ‡ before the Chief Clerk on the day of 18 , at o'clock, or such other time as having regard to the condition of the debtor may be convenient, and that the trustee [or assignee] and § be at liberty to attend such examination and take part therein.

Given under the seal of the Court this day of 18

By the Court,

Chief Clerk.

\* Insert name and address of applicant, and the capacity in which he makes the application.

† This part of the order to be adapted to the circumstances of the case.

‡ Insert place of examination.

§ Insert name of any other person authorized by the Court to attend.

## No. 55.

APPLICATION TO COURT TO FIX A DAY FOR HEARING AN APPLICATION FOR THE  
RELEASE OF AN ESTATE FROM SEQUESTRATION.

(Title.)

Please appoint a day for the hearing of and set down for hearing an application to be made by the above-named insolvent to the Court for an order releasing estate from sequestration.

Dated this day of 18

Yours, &amp;c.,

of

Solicitor for the said

To Esq.,

Chief Clerk.

## No. 55A.

## FORM OF NOTICE UNDER SECTION 131 OR 132 OF THE PRINCIPAL ACT.

## The Insolvency Acts.

In the Court of Insolvency,  
District.

In the Matter of of

Take notice that it is my intention on the day of at to apply to the Court for a release of my estate from sequestration.

(Signed)

[If under section 131 add—If you have not already proved your debt you should do so at once. The composition offered is (*state composition*). And take notice that if three-fourths in number and value of creditors who have proved debts before the date of such application consent in writing to accept the said offer and the Court holds the offer of composition [or security for composition] to be reasonable or calculated to benefit the general body of creditors the Court may release my estate from sequestration.]

## No. 56.

## ORDER TO RELEASE ESTATE FROM SEQUESTRATION ON A COMPOSITION.

(Title.)

Whereas the estate of the said A. B. was, by order under the hand of Y. Z., Esq., Chief Clerk of the Court of Insolvency at , dated the day of

18, placed under sequestration [or was by orders *nisi* and *absolute*, dated respectively the day of 18 and the day of 18 adjudged to be sequestrated] under and in accordance with the provisions of the Insolvency Acts. And whereas pursuant to the 131st section of the *Insolvency Act 1890* three-fourths in number and value of the creditors of the said A.B., who have proved their debts by writing under their hands, have agreed to accept an offer of composition [or security for composition] by the said A.B. [or by C.D. on his behalf]. And whereas the said A.B. has applied to the said Court for an order releasing his estate from sequestration. Upon reading *etc.* [as the case may be]. And upon hearing Mr. G.H. of counsel for the said A.B. in support of the said application, and no one appearing to oppose the said application [or and Mr. of counsel for [the trustee or A.B., a creditor who has proved his claim] [or the Official Accountant], and the Court being satisfied that such offer has been actually accepted in manner aforesaid, and that the terms of such offer have been complied with by the said A.B., and that acceptance of the same has not been procured by him or by any one on his behalf to his knowledge or belief by any fraudulent or undue means or influence, or to the advantage of one creditor over another, and it appearing to the Court that the said offer of composition [or security for composition] is reasonable [or calculated to benefit the general body of creditors] and that provision has been made for payment of all proper costs, charges, and expenses of and incidental to the insolvency. This Court doth order that the estate of the said A.B. be and the same is hereby released from sequestration.

Given under the seal of the Court this day of 18

By the Court,  
Chief Clerk.

No. 57.

ORDER RELEASING ESTATE FROM SEQUESTRATION ON RELEASE OR PAYMENT  
IN FULL.

(Title.)

Whereas the estate of the said A.B. was, by order under the hand of C.D., Esq., Chief Clerk of the Court of Insolvency at , dated the day of 18, placed under sequestration [or was by orders *nisi* and *absolute* dated respectively the day of 18 and the day of 18 adjudged to be sequestrated] under and in accordance with the provisions of the Insolvency Acts. And whereas pursuant to the 132nd section of the *Insolvency Act 1890* the said A.B. [or on his behalf] has paid in full all his creditors [or has obtained a legal release of the debts due by him to all his creditors.] And whereas the said A.B. has applied to the said Court for an order releasing his estate from sequestration. Upon reading, *etc.* [as the case may be]. And this Court being satisfied that all the creditors of the said insolvent have been paid in full [or have by legal release released the debts due to them by the said insolvent], and that provision has been made for payment of all proper costs, charges, and expenses of and incidental to the insolvency. This Court doth order that the estate of the said A.B. be and the same is hereby released from sequestration.

Given under the seal of the Court this day of 18

By the Court,  
Chief Clerk.

No. 58.

APPLICATION TO COURT TO FIX A DAY FOR HEARING AN APPLICATION FOR  
A CERTIFICATE OF DISCHARGE.

(Title.)

I, the above-named A.B., of , whose estate was sequestrated on the day of 18 [or adjudged to be sequestrated by orders *nisi* and *absolute*, dated respectively the day of 18 and the day of 18] being desirous of obtaining my certificate of discharge, hereby apply to the Court to fix a day for hearing my application.

Dated this day of 18

(Signed) A.B.

To the Chief Clerk of the Court of Insolvency.

## No. 59.

## GAZETTE NOTICE OF APPLICATION FOR CERTIFICATE OF DISCHARGE UNDER SECTION 138.

(Title.)

The above-named                      intends to apply to the Court of Insolvency at  
on the                      day of                      189                      , at                      o'clock in the forenoon, for  
a certificate of discharge pursuant to the provisions of the Insolvency Acts.

Dated the                      day of                      18                      (Signed)

## No. 60.

## NOTICE TO TRUSTEES OF APPLICATION FOR A CERTIFICATE OF DISCHARGE AND FOR DISPENSATION.

(Title.)

Take notice that I, the above-named A.B., whose estate was sequestrated on the  
day of                      18                      , intend to apply to this honorable Court on  
the                      day of                      189                      , at the hour of half-past Ten o'clock in  
the forenoon, for a certificate of discharge under the Insolvency Acts [and to dis-  
pense with the condition mentioned in section 139 of the *Insolvency Act 1890*].

Dated this                      day of                      189

Signature of insolvent—

Address—

Description—

The above-named insolvent.

To—

## No. 61.

## NOTICE TO CREDITORS OF APPLICATION FOR A CERTIFICATE OF DISCHARGE AND DISPENSATION.

(Title.)

Take notice that I, the above-named A.B., intend to apply to this honorable  
Court on the                      day of                      189                      , at the hour of half-past Ten o'clock  
in the forenoon, for a certificate of discharge under the Insolvency Acts [and to  
dispense with the condition mentioned in section 139 of the *Insolvency Act 1890*].

Dated this                      day of                      189

of

The above-named insolvent.

To—

NOTE.—On the hearing of the application the Court may hear any creditor, and may put such questions to the insolvent and receive such evidence as the Court thinks fit, and on being satisfied that the notices required by the above-mentioned Acts have been duly sent and published, may either grant or refuse the certificate of discharge or suspend the operation of the certificate for a specified time, or grant the certificate of discharge subject to any conditions with respect to payment of dividend or to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property. Provided that the Court shall refuse the certificate of discharge in all cases where the Court is satisfied by evidence that the insolvent has been guilty of any offence under the Insolvency Acts, unless for special reasons the Court otherwise determines.

## No. 62.

## AFFIDAVIT OF POSTING NOTICES TO CREDITORS OF INSOLVENT'S APPLICATION FOR A CERTIFICATE OF DISCHARGE.

(Title.)

I,                      , of                      , make oath and say as follows :—

1. That I did on the                      day of                      189                      , send to each creditor who has proved in this matter, and also to each of the creditors mentioned in the

insolvent's schedule or who are known to the insolvent, and also to the trustee herein a notice of the time and the place appointed by the Court for hearing the insolvent's application for a certificate of discharge in the form hereunto annexed, marked "A."

2. That such notices were addressed to such of the said creditors who have proved their debts, according to the addresses in their respective proofs, and to such as have not proved according to their respective names and addresses appearing in the insolvent's schedule (a) and to the trustee at \_\_\_\_\_, being his last-known address.

3. That I sent the said notices by putting the same into the post office situate \_\_\_\_\_, before the hour of \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon of the said day.

Sworn at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 189 \_\_\_\_\_, before me

(a) In the event of the notices being sent to any other address than the one given in the creditor's proof or in the insolvent's schedule, add "except in the case of A.B., addressed to \_\_\_\_\_ C.D., addressed to \_\_\_\_\_," &c., those being the several addresses given to me by the insolvent in lieu of the addresses given in their proofs or appearing in the insolvent's schedule. If the insolvent himself posts the notices the words "known to me" will be sufficient instead of "given to me by the insolvent." The insolvent will be required to make an affidavit that he was not aware at the time that the affidavit was sworn of any change of address of any of his creditors other than those referred to in the affidavit.

#### No. 63.

#### NOTICE OF OPPOSITION BY CREDITOR WHERE REQUIRED BY COURT TO BE FURNISHED.

##### The Insolvency Acts.

In the Court of Insolvency,  
District.

In the matter of \_\_\_\_\_ of \_\_\_\_\_ an insolvent.

To \_\_\_\_\_ the above-named insolvent.

I [or as the case may be we] intend to oppose the grant of a certificate of discharge to you on the grounds following:—

1. \_\_\_\_\_ [as the case may be].

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_  
(Signed) \_\_\_\_\_

#### No. 64.

#### ORDER UNDER SECTION 149.

(Title.)

Upon the application of [as the case may be], it appearing that the above-named \_\_\_\_\_ has not applied for his certificate within six months from the date of the order of sequestration of his estate, I do hereby order the said \_\_\_\_\_ to attend before the Court on the \_\_\_\_\_ day of \_\_\_\_\_ 189 \_\_\_\_\_, at \_\_\_\_\_ o'clock, at \_\_\_\_\_, to have the question of a grant or refusal of his certificate dealt with, as by the said Act provided.

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_  
Judge of the Court of Insolvency.

#### No. 65.

#### ORDER GIVING LEAVE TO INSOLVENT TO APPLY FOR CERTIFICATE OF DISCHARGE.

(Title.)

Upon reading the affidavit of the above-named insolvent, A.B., and upon hearing

the solicitor for the said A.B., this Court doth order that the above-named A.B. have leave to apply to this Court for his certificate of discharge.

Given under the seal of the Court this                      day of                      18  
By the Court,                      Chief Clerk.

—  
No. 66.

ORDER GRANTING A CERTIFICATE OF DISCHARGE UNCONDITIONALLY.

(Title.)

On the application of, &c.                      whose estate was placed under seques-  
tration on the                      day of                      1899 [or adjudged to be sequestrated  
by orders *nisi* and *absolute*, dated respectively the                      day of  
18                      and the                      day of                      18                      . And upon taking into  
consideration the report of the trustee [or assignee] [or and the report of the  
Official Accountant] as to the insolvent's conduct and affairs, including the in-  
solvent's conduct during the proceedings under his insolvency, and upon hearing  
C.D., E.F., &c., creditors, and G.H., the trustee [as the case may be] and  
whereas it has been proved to the satisfaction of this Court that the failure of the  
insolvent's estate to pay 7s. in the £1 has arisen from circumstances for which the  
insolvent cannot in the opinion of the Judge justly be held responsible: And  
whereas it has not been proved that the insolvent has been guilty of any offence  
under the Insolvency Acts, or that the insolvent has been guilty of any miscon-  
duct in relation to his property and affairs, this Court doth order [that the con-  
dition mentioned in section 139 of the *Insolvency Act* 1890 be and the same is  
hereby dispensed with]: And this Court doth further order that a certificate of  
discharge do issue to the said

Given under the seal of the Court this                      day of                      18  
By the Court,                      Chief Clerk.

—  
No. 67.

ORDER REFUSING TO DISPENSE WITH THE CONDITION AS TO PAYMENT OF 7s. IN £1.

(Title.)

On the application of [commencement as in Form 66]. And whereas it has not  
been proved to the satisfaction of this Court that the failure of the insolvent's  
estate to pay 7s. in the £1 has arisen from circumstances for which the insolvent  
cannot in the opinion of the Judge justly be held responsible: And whereas it  
has not been proved that the insolvent has been guilty of any offence under the  
Insolvency Acts or that the insolvent has been guilty of any misconduct in  
relation to his property and affairs, this Court doth refuse to dispense with the  
condition mentioned in section 139 of the *Insolvency Act* 1890, and this Court doth  
order that a certificate of discharge do issue to the said                      on payment  
of 7s. in the £1.

Given under the seal of the Court this                      day of                      1899  
By the Court,                      Chief Clerk.

—  
No. 68.

ORDER SUSPENDING CERTIFICATE OF DISCHARGE.

(Title.)

On the application of [commencement as in Form 66]. And whereas it has not  
been proved that the insolvent has been guilty of any offence under the Insolvency  
Acts [or it having been proved that the insolvent has committed the following  
offences, viz.: [set them out], but the Court has for following special reasons [state  
them] determined that his certificate of discharge shall not on that ground be  
absolutely refused] this Court doth order that the insolvent's discharge be  
suspended until a dividend of not less than                      shillings in the £1 has  
been paid to the creditors, with liberty to the insolvent at any time after the

expiration of two years from the date of this Order to apply for a modification thereof pursuant to section 95 of the *Insolvency Act 1897* [or this Court doth order that the insolvent's certificate of discharge be suspended for                      years.]

Given under the seal of the Court this                      day of                      , 18

By the Court,                      Chief Clerk.

—  
No. 69.

ORDER FOR CERTIFICATE OF DISCHARGE SUBJECT TO CONDITIONS AS TO EARNINGS, AFTER-ACQUIRED PROPERTY, AND INCOME.

(Title).

On the application of A.B., of                      , &c., whose estate was placed under sequestration on the                      day of                      , 18                      [or adjudged to be sequestrated by orders *nisi* and *absolute* dated respectively the                      day of                      , 18                      , and the                      day of                      18                      ], and upon taking into consideration the report of the [trustee or assignee] [or and of the Official Accountant] as to the insolvent's conduct and affairs, and\* And whereas it has not been proved † It is ordered that a certificate of discharge be granted to the insolvent subject to the following conditions as to his future earnings, after-acquired property, and income:—

After setting aside out of the insolvent's earnings, after-acquired property, and income the yearly sum of £                      for the support of himself and his family the insolvent shall pay the surplus, if any [or such portion of such surplus as the Court may determine], of such earnings, after-acquired property, and income to the trustee [or assignee] for distribution among the creditors in the insolvency. An account shall on the 1st day of January in every year, or within fourteen days thereafter, be filed in these proceedings by the insolvent, setting forth a statement of his receipts from earnings, after-acquired property, and income during the year immediately preceding the said date, and the surplus payable under this order shall be paid by the insolvent to the trustee [or assignee] within fourteen days of the filing of the said account.

Given under the seal of the Court this                      day of                      189

By the Court,                      Chief Clerk.

\* Further recitals to be inserted as in Form 66.

† This recital to follow the other forms with necessary variations.

—  
No. 70.

ORDER REFUSING CERTIFICATE OF DISCHARGE.

(Title.)

On the application of A.B., of                      , &c., whose estate was placed under sequestration on the                      day of                      18                      [or adjudged to be sequestrated by orders *nisi* and *absolute*, dated respectively the                      day of                      18 and the                      day of                      18 and upon taking into consideration the report of the trustee [or assignee] [or and the report of the Official Accountant] as to the insolvent's conduct and affairs, including the insolvent's conduct during the proceedings under his insolvency, and upon hearing C.D., E.F., &c., creditors, and G.H. the trustee [as the case may be]. And whereas it has been proved that the insolvent has committed the following offences, e.g. [here state particulars], or and that he has been guilty of misconduct in relation to his property and affairs [here state particulars] this Court doth order that the certificate of the said insolvent be, and the same is hereby refused. [And this Court doth further order that the said insolvent do pay to the said                      or to Mr.                      his solicitor his taxed costs of the said applications forthwith after the taxation thereof.]

Given under the seal of the Court, this                      day of                      18

By the Court,                      Chief Clerk.

**(Title).**

[illegible]

(Title.)

2. The statement hereunto annexed is a full, true, and complete account of all moneys earned by me and of all property and income acquired as received by me since the date of my discharge [or since the date when last I filed a statement of after-acquired property and income in Court, namely the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_.]

**Signature of Debtor.**

(Title.)

By the Court,                      Chief Clerk.

(Title.)

Whereas by order dated \_\_\_\_\_ the certificate of discharge of the above-named \_\_\_\_\_ was suspended [or refused], and the said \_\_\_\_\_ was adjudged guilty of the offences following, that is to say [set out offences] and was ordered to be imprisoned for \_\_\_\_\_ months [with hard labour]; these are therefore to

require you the said \_\_\_\_\_ to arrest and deliver the said \_\_\_\_\_ to the  
 said \_\_\_\_\_ the governor or keeper of Her Majesty's gaol at \_\_\_\_\_ and these are  
 to require you the said \_\_\_\_\_ to receive and keep in custody [and keep to hard  
 labour] the said \_\_\_\_\_ for the space of \_\_\_\_\_ and for so doing this shall be your  
 sufficient authority.

Given under the seal of the Court this \_\_\_\_\_ day of \_\_\_\_\_ 189

By the Court,  
 Chief Clerk.

No. 75.

PROOF OF DEBT—GENERAL FORM.

(Title.)

I.\* of \_\_\_\_\_, in the colony of \_\_\_\_\_, make oath and say—

† That I am in the employ of the under-mentioned creditor, and that I am duly  
 authorized by \_\_\_\_\_ to make this affidavit, and that it is within my own know-  
 ledge that the debt hereinafter deponed to was incurred and for the consideration  
 stated, and that such debt, to the best of my knowledge and belief, still remains  
 unpaid and unsatisfied.

‡ That I am duly authorized, under the seal of the company hereinafter named,  
 to make the proof of debt on its behalf.

1. That the said \_\_\_\_\_ w \_\_\_\_\_ at the date of the order of sequestration, viz.,  
 the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, and still justly and truly indebted to §  
 in the sum of \_\_\_\_\_ pounds \_\_\_\_\_ shillings and \_\_\_\_\_ pence for || \_\_\_\_\_ as shown by  
 the account indorsed hereon or by the following account, viz:— \_\_\_\_\_ for which  
 sum or any part thereof I say that I have not nor hath ¶ \_\_\_\_\_ or any person  
 by \*\* \_\_\_\_\_ order to my knowledge or belief for \*\* \_\_\_\_\_ use had or received  
 any manner of satisfaction or security whatsoever save and except the follow-  
 ing:—††

Date.	Drawn.	Acceptor.	Amount.	Due date.

Sworn at \_\_\_\_\_ in the colony of \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 18  
 Before me ¶ \_\_\_\_\_ (Deponent's Signature)

The proof cannot be admitted for voting at the meeting for the appointment of  
 a trustee and a committee of inspection unless it is properly completed and lodged  
 with the assignee not later than 24 hours before the time fixed for holding such  
 meeting.

You should attend carefully to these directions—

\* Fill in full name, address, and occupation of deponent. If proof made by creditor strike out  
 clauses † and ‡. If made by a clerk strike out †. If by agent of company strike out †.

§ Insert *me*, and to C.D. and E.F., my co-partners in trade (if any), or if by the clerk insert  
 name, address, and description of principal.

|| *State consideration* [as goods sold and delivered by me] [and my said partner] to him [or them]  
 at his [or their] request between the dates of [or moneys advanced by me in respect of the under-  
 mentioned bill of exchange] [or as the case may be.]

¶ My said partners or any of them or the above-named creditor [as the case may be.]

\*\* My or our or their or his [as the case may be.]

†† [Here state the particulars of all securities held, and where the securities are on the property  
 of the debtor assess the value of the same, and if any bills or other negotiable securities be held  
 specify them in the schedule.]



*Particulars of Account referred to on other side.*

(Credit should be given for Contra Accounts.)

If space not sufficient let the particulars be annexed, but where the particulars are on a separate sheet of paper the same must be marked by the person before whom the affidavit is sworn.

[illegible]

The vouchers (if any) by which the account can be substantiated should be set out.

No. 76.

### PROOF OF DEBT OF WORKMAN.

**(Title).**

I\* of † make oath and say :—

1. That § w at the date of the order of sequestration, viz., the day of 189 , and still justly and truly indebted to the several persons whose names, addresses, and descriptions appear in the schedule indorsed hereon in sums severally set against their names in the sixth column of such schedule for wages due to them respectively as workmen or others§ in respect of services rendered by them respectively to || during such periods before the date of the order of sequestration as are set out against their respective names in the fifth column of such schedule, for which said sums or any part thereof I say that they have not nor hath any of them had or received any manner of satisfaction or security whatsoever.

Sworn at \_\_\_\_\_ in the colony of Victoria this  
day of \_\_\_\_\_ one thousand eight hundred and ninety  
Before me—

Deponent's  
signature.

• Fill in full name, address, and occupation of deponent.

† The above-named debtor, or the foreman of the above-named debtor, or on behalf of the workmen and others employed by the above-named debtor.

† "I" or "the said."

§ "My employ" or "the employ of the above-named debtor."

"Me" or "the above-named debtor."

**Schedule referred to on the other side.**

1. No.	2. Full name of workman.	3. Address.	4. Description.	5. Period over which wages due.	6. Amount due.		
					£	s.	d.

**Signature of deponent**

Signature of commissioner or }  
officer administering oath }

## No. 77.

## NOTICE OF REJECTION OF PROOF OF DEBT.

(Title.)

Take notice that as assignee or trustee [*as the case may be*] of the above estate, I have this day rejected your claim against such estate\* [*to the extent of £*] on the following grounds :—[*state these*] And further take notice that if you do not apply to the Court to reverse or vary my decision in rejecting your proof before the expiration of fourteen days from this date you will be excluded from dividend.

Dated this                      day of                      189

Signature—

Assignee or Trustee

Address—

To

\* If proof wholly rejected strike out words in italics.

## No. 78.

## GENERAL PROXY.

(Title.)

I\*                      of                      a creditor hereby appoint †                      to be ‡  
general proxy in the above matter [excepting as to the receipt of dividend].

Dated this                      day of                      189

(Signed)

Signature of Witness—

Address—

## NOTES.

1. When the creditor desires that his general proxy should receive dividends he should strike out the words "excepting as to the receipt of dividend," putting his initials thereto.

2. The authorized agent of a corporation may fill up blanks, and sign for the corporation thus—

For the

company,

S.S. (duly authorized under the seal of the company).

3. A proxy given by a creditor may be filled up and signed by any person having a general authority in writing to sign for such creditor. Such person shall sign—

J. S. [duly authorized by a general authority in writing to sign on behalf of [name of creditor].

CERTIFICATE TO BE SIGNED BY PERSON OTHER THAN CREDITOR FILLING UP  
THE ABOVE PROXY.

I,                      of                      being a [*here state whether barrister and solicitor, clerk, or manager in the regular employment of the creditor or a commissioner of the Supreme Court for taking affidavits, or a commissioner for taking declarations and affidavits*] hereby certify that all insertions in the above proxy are in my own handwriting and have been made by me at the request of the above-named and in his presence, before he attached his signature [or mark] thereto.

Dated this                      day of                      189

(Signature.)

The proxy must be lodged with the assignee or trustee not later than four o'clock on the day before the meeting at which it is to be used.

\* If a firm, write "We" instead of "I," and set out the full name of the firm.

† Here insert either "Mr.                      of                      , a clerk, manager, &c., in my regular employ  
or" as the case may be. The standing of the person appointed must be clearly set out.

‡ "My" or "our."

§ If a firm, sign the firm's trading title, and add by "A.B.," a partner in the said firm. As to signature by agent see footnotes 2 and 3.

|| The assignee or trustee may require the authority to sign to be produced for his inspection.

## No. 79.

## SPECIAL PROXY.

(Title.)

I \* of a creditor, hereby appoint † as ‡  
 proxy at the meeting of creditors to be held on the day of 189 ,  
 or at any adjournment thereof, to vote §

Dated this day of 189

(Signed) :

Signature of witness—

Address—

## NOTES.

1. A creditor may give a special proxy to any person to vote at any specified meeting, or adjournment thereof, on all or any of the following matters—

(a) For or against the appointment of any specified person as trustee at a specified rate of remuneration or as member of the committee of inspection, or for or against the continuance in office of any specified person as trustee or member of a committee of inspection.

(b) On all questions relating to any matter other than those above referred to arising at any specified meeting or adjournment thereof.

2. The authorized agent of a corporation may fill up blanks and sign for the corporation, thus:—

“For the Company,  
 J.S. (duly authorized under the seal of the company).”

3. A proxy given by a creditor may be filled up and signed by any person having a general authority in writing to sign for such creditor. Such person shall sign—

(J.S. (duly authorized by a general authority in writing to sign on behalf of [name of creditor])).¶

CERTIFICATE TO BE SIGNED BY PERSON OTHER THAN CREDITOR FILLING UP  
 THE ABOVE PROXY.

I \*\* of being a [*here state whether barrister and solicitor, or manager or clerk in the regular employment of the creditor, or a commissioner of the Supreme Court for taking affidavits, or a commissioner for taking declarations and affidavits*] hereby certify that all insertions in the above proxy are in my own handwriting, and have been made by me at the request of the above-named and in his presence before he attached his signature [or mark] thereto.

Dated this day of 189

(Signature.)

The proxy must be lodged with the assignee or trustee not later than four o'clock on the day before the meeting at which it is to be used.

\* If a firm, write “We” instead of “I,” and set out the full name of the firm.

† Here insert either “Mr. . of .”

‡ “My” or “our.”

§ Here insert the word “for” or the word “against,” as the case may require, and specify the particular resolution or name of proposed trustee, remuneration, or other matter.

¶ If a firm, sign the firm's trading title, and add—“by A.B., partner in the said firm.” As to signature by agent, see footnotes 1 and 2.

¶ The assignee or trustee may require the authority to sign to be produced for his inspection.

\*\* Name, address, and description.

## APPENDIX OF FORMS TO INSOLVENCY RULES 1898.

No. 80.

## LIST OF CREDITORS ASSEMBLED TO BE USED AT EVERY MEETING.

(Title.)			
Meeting held at		this	day of 18
Number.	Names of Creditors Present or Represented.	Amount of Proof.	
1			
2			
3			
4			
5			
5	Total number of creditors present or represented.		

No. 81.

## ORDER OF COURT FOR GENERAL MEETING OF CREDITORS.

(Title.)

Upon the application of C.D. of \_\_\_\_\_ it is ordered that the trustee of the property of the insolvent do summon a meeting of the creditors of the insolvent to be held at \_\_\_\_\_ on the \_\_\_\_\_ day of 189 \_\_\_\_\_ at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon [*here state the purpose for which meeting called*].

Dated this \_\_\_\_\_ day of 189 \_\_\_\_\_

By the Court,

Chief Clerk<sup>1</sup>

No. 82.

## NOTICE OF MEETING (GENERAL FORM).

(Title.)

Take notice that a meeting of creditors in the above matter will be held at \_\_\_\_\_ on the \_\_\_\_\_ day of 189 \_\_\_\_\_ at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon [*here state the purpose for which meeting called*].

Dated the \_\_\_\_\_ day of 189 \_\_\_\_\_

(Signed) \*

Address \_\_\_\_\_

\* "Trustee" or "assignee."

No. 83.

## AFFIDAVIT OF POSTAGE OF NOTICES (GENERAL).

(Title.)

I, \_\_\_\_\_ the assignee [or trustee] or clerk to the assignee [or trustee] [*as the case may be*] in the above matter make oath and say as follows :-

1. That I did on the            day            18    send to each creditor who has proved in this matter, and also to all creditors mentioned in the insolvent's schedule a notice of \*            in the form hereunto annexed marked A.

2. That such notices were addressed to such of the said creditors who have proved their debts according to the addresses in their respective proofs, and to such as have not proved according to their respective names and addresses appearing in the insolvent's schedule.

3. That I sent the said notices by putting the same into the post-office at            before the            hour of            o'clock in the            noon on the same day.

Sworn at            in the Colony of Victoria }  
this            day of            18            (Signature)  
Before me—

\* Insert here "the time and place of general meeting" or "adjourned general meeting" or as the case may be.

---

No. 84.

NOTICE TO CREDITORS OF MEETING TO REMOVE TRUSTEE AND TO APPOINT A PERSON TO FILL THE VACANCY.

(Title.)

At the request of one-sixth of the creditors of the insolvent in number and value who have proved a general meeting of the creditors is hereby summoned, to be held at            on the            day of 189    at            o'clock in the            noon, for the purpose of considering the propriety of removing G.H., the trustee of the property of the insolvent, from his office as such trustee, and in the event of his removal to appoint a person to fill the vacancy.

Dated the            day of            189

L.M.,

A member of the Committee of Inspection.  
[or Chief Clerk].

---

No. 85.

NOTICE OF MEETING TO BE HELD TO APPOINT NEW TRUSTEE.

(Title.)

Notice is hereby given that a meeting of creditors will be held at the Insolvency Court Offices, situate at            on the            day of            189    at            o'clock in the            noon, for the purpose of appointing a trustee in the place of the late trustee, who has resigned the office [or who has died or has become insolvent].

Dated this            day of            189

To K.Z.

Chief Clerk.

---

No. 86.

APPLICATION FOR DIRECTIONS BY TRUSTEE.

(Title.)

I desire to make application to the Court for its directions [here state the particular matter in relation to which they are sought].

Let this application be heard on the

day of

at            o'clock

Trustee.

in the                      noon, and let the trustee give notice to [*here insert the persons to whom it is to be given*].

Dated this                      day of                      189

Judge of the Court of Insolvency.  
District.

No. 87.

#### ORDER ON APPLICATION OF TRUSTEE FOR DIRECTIONS.

(Title.)

Whereas at a Court held this day the trustee of the property of the insolvent applied to this Court for its direction [*here state the particular matter in relation to which they are sought*]. Now upon hearing of C.D., of                      on the matter it is ordered [*here set out the order*], and that the trustee do pay out of his own moneys or out of the property of the insolvent] the sum of                      the costs of this order, and the sum of                      to C.D. for his costs [*or that C.D. do pay the sum of                      the costs of this order, and also the sum of                      to for his costs*].

Given under the seal of the Court this                      day of                      189

By the Court,  
Chief Clerk.

No. 88.

#### DISCLAIMER BY TRUSTEE.

(Title.)

I                      assignee [*or the trustee*] of the property of the above-named insolvent hereby disclaim the \*                      of the premises †                      which were let to the above-named insolvent ‡                      at a rent of £                      per                      Notice of this disclaimer has been given to §

Dated this                      day of                      189

Assignee [*or Trustee*].

Address—

\* Lease dated the                      or as the case may be.

† Insert description of the property.

‡ On a tenancy or for a term of                      years, or as the case may be.

§ Insert names and addresses of persons to whom notice given.

No. 89.

#### NOTICE OF DISCLAIMER.

(Title.)

Take notice that by writing under my hand bearing date the                      day of                      18                      1                      the assignee [*or trustee*] of the property of the above-named insolvent disclaimed \*                      of the premises known as † which were let to ‡                      at a rent of £                      per

The above-mentioned disclaimer has been filed in Court with the proceedings in the insolvency.

Your attention is directed to the provisions of the Insolvency Acts written on the back hereof.

Dated this                      day of                      18

Assignee [*or Trustee*].

Address—

NOTE.—On the back of this notice the provisions of section 84 of the *Insolvency Act* 1890 should be written.

\* The lease dated the                      day of                      18                      or as the case may be.

† Insert description of property disclaimed.

‡ On a tenancy or for the term of                      years, or as the case may be.

## No. 90.

## NOTICE OF TRANSFER OF SEPARATE ESTATE TO JOINT ESTATE FOR "VICTORIA GOVERNMENT GAZETTE."

In Insolvency.

(Title.)

Notice is hereby given that there being in the hands of the trustee in the above insolvency a surplus estimated at £ arising from the separate estate of [name of separate partner] one of the insolvents, and there being no separate creditors of such insolvent, it is the intention of such trustee at the expiration of days from the appearance of this notice in the *Victoria Government Gazette* to transfer such surplus to the credit of the joint estate in the said insolvency.

Dated this day of 189  
(Signed) Trustee.

## No. 91.

## NOTICE IN "GAZETTE" OF INTENDED DIVIDEND.

The Insolvency Acts.

In the Court of Insolvency,  
District.

A dividend is intended to be declared in the matter of A.B., of whose estate was sequestrated on the day of 18  
[or was adjudged to be sequestrated by orders nisi and absolute dated respectively the day of 18 and day of 18

Creditors who have not proved their debts by the day of 18 will be excluded.

Dated this day of 18 Trustee.

## No. 92.

## NOTICE TO CREDITORS OF INTENTION TO DECLARE DIVIDEND.

(Title.)

A \* dividend is intended to be declared in the above matter. You are mentioned in the insolvent's schedule, but you have not yet proved your debt. If you do not prove your debt by the day of 189 you will be excluded from this dividend.

Dated this day of 189

To X.Y.

G.H., Trustee.

Address—

\* Insert here "first," or "second," or "final," as the case may be.

## No. 93.

## STATEMENT TO ACCOMPANY NOTICE OF DIVIDEND AND APPLICATION FOR RELEASE.

The Insolvency Acts.

In the Court of Insolvency,  
District.

In the Matter of [here state name, address, and description of debtor] under sequestration order dated day of 18

## APPENDIX OF FORMS TO INSOLVENCY RULES 1898.

STATEMENT SHOWING POSITION OF ESTATE AT DATE OF DECLARING DIVIDEND OR AT  
DATE OF APPLICATION FOR RELEASE (AS THE CASE MAY BE).

*Dr.*

Cr.

[illegible]

• Insert number of creditors.

† First, or as the case may be.

By section 22 of the *Insolvency Act* 1897 it is provided that—"If one-fourth in number or value of the creditors dissent from the resolution fixing the remuneration, or the insolvent or any creditor satisfies the Court that the remuneration is unnecessarily large, the Court shall fix the amount of the remuneration."

Assets not yet realized estimated to produce £

[Add here any special remarks trustee thinks desirable.]

Creditors can obtain any further information by inquiry at the office of the trustee.

Dated this                      day of

189

(Signature of trustee)  
(Address)

NOTE.—When this statement accompanies a declaration of a second or subsequent dividend it shall incorporate the figures of the preceding statement or statements under their respective headings.





## No. 96.

## NOTICE OF DIVIDEND.

(Title).

[Please bring this Dividend Notice with you.]

Dividend of \_\_\_\_\_ in the £.

[Address.]

Date, 189

Notice is hereby given that a \_\_\_\_\_ dividend of \_\_\_\_\_ in the £ has been declared in this matter, and that the same may be received at \_\_\_\_\_ office, as above, on \_\_\_\_\_ the \_\_\_\_\_ of \_\_\_\_\_ or on any subsequent between the hours of \_\_\_\_\_

Upon applying for payment this notice must be produced entire, together with any bills of exchange or other securities held by you; and if you do not attend personally you must fill up and sign the subjoined forms of receipt and authority, when a cheque payable to your order will be delivered to the bearer.

(Signed) G.H., Trustee.

To

NOTE.—On application for the dividend this notice must be produced entire, and the bills or other securities held by you must be produced.

## RECEIPT.

189

Received of \_\_\_\_\_ the sum of \_\_\_\_\_ pounds \_\_\_\_\_ shillings and \_\_\_\_\_ pence, being the amount payable to \_\_\_\_\_ in respect of the dividend of \_\_\_\_\_ in the £ on \_\_\_\_\_ claim against this estate.

(Creditor's signature.)

£ : :

## AUTHORITY.

Sir,

Please deliver to [insert the name of the person who is to receive the cheque, or the words "me by post" if you wish the cheque sent to you in that way] the cheque for the dividend payable to \_\_\_\_\_ in this matter.

(Creditor's signature.)

To

## No. 97.

## NOTICE TO PERSONS CLAIMING TO BE CREDITORS OF INTENTION TO DECLARE FINAL DIVIDEND.

(Title.)

Take notice that a final dividend is intended to be declared in the above matter, and that if you do not establish your claim to the satisfaction of the Court on or before the \_\_\_\_\_ day of \_\_\_\_\_ 189 \_\_\_\_\_ or such later day as the Court may fix, your claim will be expunged, and I shall proceed to make a final dividend without regard to such claim.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 189

G.H., Trustee.

To X.Y.

[Address.]

## No. 98.

## APPLICATION BY CREDITOR FOR ORDER FOR TRUSTEE TO PAY DIVIDEND WITHHELD, AND ORDER THEREON.

(Title.)

I, F. K., of \_\_\_\_\_ make application to this Court for an order to be made upon the trustee to pay the dividend in this insolvency due to me, with interest thereon for the time it has been withheld from me, that is to say, from the \_\_\_\_\_ day of \_\_\_\_\_ 189 \_\_\_\_\_, on which day I applied to the trustee for its payment to me, and also to pay to me the costs of this application

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 189

F.K.

## ORDER.

Upon the reading of this application, and upon hearing it is ordered that the trustee do forthwith pay to the said F.K. the sum of £ the amount of such dividend. And it is further ordered that the trustee do pay to the said creditor at the same time the sum of for interest on such dividend, being at the rate of £5 per cent. per annum for the time that its payment has been withheld, together with a further sum of for the costs of this application.

Given under the seal of the Court this day of 189

By the Court,

Chief Clerk.

[If the Court does not order payment, then after the words "it is ordered" insert the order made.]

## No. 99.

## AFFIDAVIT VERIFYING TRUSTEE'S ACCOUNT.

(Title.)

I, G.H., of the trustee of the property of the above-named insolvent, make oath and say—

That\* the account hereunto annexed marked B is a true copy of the Estate Cash Book, and contains a full and true account of my receipts and payments on account of the insolvent's estate from the day of inclusive, \*and that I have not nor has any other person by my order, or for my use, during any such period received or paid any moneys on account of the said estate \*other than and except the items mentioned and specified in the said account.

Sworn at, &c.

NOTE.—If no receipts or payments, strike out the words in italics.

## No. 100.

## CERTIFICATE BY COMMITTEE OF INSPECTION AS TO AUDIT OF TRUSTEE'S ACCOUNT.

We, the undersigned members of the Committee of Inspection in the matter of an insolvent, hereby certify that we have examined the foregoing account with the vouchers, and that to the best of our knowledge and belief the said account contains a full, true, and complete account of the trustee's receipts and payments on account of the estate.

Dated this day of 189

A.B.,  
C.D., } Committee of Inspection.  
E.F., }

## No. 101.

## TRUSTEE'S TRADING ACCOUNT.

(Title.)

G.H., the trustee of the property of the insolvent, in account with the estate.

Dr. Receipts.

Payments.

Cr.

Date.					Date.				

(Date)

G.H., Trustee.

## APPENDIX OF FORMS TO INSOLVENCY RULES 1898.

We have examined this account with the vouchers and find the same correct, and we are of opinion the expenditure has been proper.

Dated this                      day of                      189

**Committee of Inspection,  
[or Member of the Committee of Inspection.]**

**No. 102.**

### PROFIT AND LOSS ACCOUNT (TRADING ACCOUNT).

(Title).

<i>Dr.</i>		<b>PROFIT AND LOSS ACCOUNT.</b>		<i>Cr.</i>	
Stock on hand on day of	189 ...	£	s. d.	Sales	... ..
Purchases	... ..			Other receipts (if any)...	
Trade expenses, viz.:—				Stock on hand on day of	189 ...
Rent and Taxes	... ..				
Wages	... ..				
Miscellaneous	... ..				
Balance, being Profit	...				

**G.H., Trustee.**

(Date)

NOTE.—This account to be submitted when the committee of inspection require, and, in any case, at the end of the trading business carried on by the trustee.

**No. 103.**

**AFFIDAVIT VERIFYING TRUSTEE'S TRADING ACCOUNT.**

(Title.)

I, G.H., of the trustee of the property of the above-named insolvent, make oath and say that the account hereto annexed is a full, true, and complete account of all money received and paid by me or by any person on my behalf in respect of the carrying on of the trade or business of the insolvent, and that the sums paid by me as set out in such account have, as I believe, been necessarily expended in carrying on such trade or business.

Sworn, &c.

**G.H., Trustee.**

No. 104.

**STATEMENT OF ACCOUNTS UNDER SECTION 39 OF THE "INSOLVENCY ACT 1890."**

(Title.)

[illegible]

(Signature.)

Dated the

**day of**

189

## No. 105.

## NOTICE TO INSOLVENT UNDER SECTION 99 OF THE PRINCIPAL ACT.

To A.B.

Take notice that I intend to apply to this Court on the \_\_\_\_\_ day  
 of 189 at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, for an order  
 under section 99 of the *Insolvency Act* 1890, for the payment of a part of your pay  
 [half-pay, salary, emolument, or pension] to me as trustee for the benefit of the  
 creditors under your insolvency.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 189 \_\_\_\_\_  
 G.H., Trustee.

## No. 106.

## ORDER SETTING ASIDE PAY, ETC., UNDER SECTION 99 OF THE PRINCIPAL ACT.

(Title.)

Whereas it having been made to appear to this Court that the insolvent is in  
 receipt of [or entitled to a salary pay, half-pay, emolument, or pension, granted  
 by the Treasury as the case may be] of about \_\_\_\_\_ pounds, as [here set  
 forth the circumstances under which the salary or income is received]: And whereas  
 upon the application of the trustee of the property of the insolvent, and upon  
 hearing the insolvent it appears to the Court just and reasonable that the annual  
 sum of \_\_\_\_\_ pounds, portion of the said salary [or pay, &c.] ought to be  
 paid by the insolvent by monthly [or quarterly] payment [according as the insol-  
 vent receives his salary or pay, &c.] to the trustee during the insolvency in order  
 that the same may be applied in payment of the debts of the said insolvent, and  
 that the first of such payments ought to be made on the \_\_\_\_\_ day of  
 189 and be continued monthly [or quarterly] until this Court shall make order  
 to the contrary: It is ordered that the said sum shall be paid by \_\_\_\_\_ in  
 manner aforesaid, out of the insolvent's said salary [or pay, &c.]

Given under the seal of the Court this \_\_\_\_\_ day of \_\_\_\_\_ 189 \_\_\_\_\_  
 By the Court, \_\_\_\_\_  
 Chief Clerk.

## No. 107.

APPLICATION TO THE COURT TO AUTHORIZE PAYMENTS OUT OF THE INSOLVENCY  
ESTATES ACCOUNT.

(Title.)

We, the committee of inspection, being of opinion that Mr. \_\_\_\_\_ of  
 the trustee in the above matter [or I, the assignee [or trustee] in  
 the above matter] being of opinion that it is for the advantage of the creditors  
 that I should have an account at the local bank for the purpose of\*  
 hereby apply to this honorable Court to authorize him [or me] to make his [or my]  
 payments into and out of the \_\_\_\_\_ bank. All cheques to be countersigned  
 by \_\_\_\_\_ a member of the committee of inspection, and by \_\_\_\_\_ for

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 189 \_\_\_\_\_  
 } Committee of Inspection  
 } [or Trustee].

\* Here insert grounds of application.

## No. 108.

## ORDER OF COURT FOR PAYMENT OUT OF INSOLVENCY ESTATES ACCOUNT.

(Title.)

This Court doth hereby authorize you to make your payments in the above  
 matter into and out of the \_\_\_\_\_ bank. All cheques to be countersigned by  
 \_\_\_\_\_, a member of the committee of inspection, and by \_\_\_\_\_

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 189 \_\_\_\_\_  
 By the Court, \_\_\_\_\_  
 Chief Clerk.

To \_\_\_\_\_ Trustee.



## No. 113.

## RETURN BY TAXING OFFICER.

## The Insolvency Acts.

In the Court of Insolvency,  
District.

Return of Bills Taxed during Year ending 31st December, 189

The Insolvency Acts.				
	Number of Bills Taxed.	Gross Amount of Bills.	Amount struck off on Taxation.	Net Amount Allowed.
Solicitor's bills	...			
Auctioneer's bills	...			
High Bailiff's bills	...			
Trustee's bills	...			
Accountant's bills	...			
Other bills	...			
Totals	...			

(Signed)

## No. 114.

## ADMISSION OF DEBT BY DEBTOR OF INSOLVENT.

(Title.)

In the Matter of A.B., of an insolvent.  
I the undersigned J.K., of do hereby admit that I am indebted to the  
said insolvent in the sum of £ upon the Balance of accounts between  
myself and the said insolvent.

Dated this day of 189

Witness—

J.K.

C.D., Chief Clerk.

## No. 115.

## ORDER TO PAY ADMITTED DEBT.

(Title.)

Whereas J.K. of in his examination taken this day and signed and  
subscribed by him has admitted that he is indebted to the said debtor in the sum  
of £ on the balance of accounts between him and the debtor, it is  
ordered that the said J.K. do pay to the trustee of the property of the debtor in  
full discharge of the sum so admitted the sum of £ forthwith [or if  
otherwise state the time and manner of payment], and do further pay to the said  
trustee the sum of £ for costs.

Given under the seal of the Court this day of 189

By the Court,

Chief Clerk.

## No. 116.

## SUMMONS UNDER SECTION 96 OF THE PRINCIPAL ACT.

## The Insolvency Acts.

In the Court of Insolvency,  
District.

In the Matter of A.B., of an insolvent.

To [insert defendant's name, address, and occupation].

You are hereby summoned to appear before the Court of Insolvency at  
on the day of 189 at o'clock  
to show cause why you should not pay to me the undersigned as assignee [or

trustee] of the property and estate of the above-named A.B. the sum of £ alleged by me to be due from you to the insolvent estate of the said A.R. ; the particulars of such debt are hereto annexed [*annex particulars*].

(Signed) X.Y.

of  
Assignee or Trustee of the estate of the said A.B.  
or C.D.,  
Solicitor of the said X.Y.

[*Address.*]

NOTE.—If you admit the whole or any part of this debt you may pay into Court such sum of money as you may think a full satisfaction of the debt, payment whereof is claimed by this summons, together with £ costs within days before the said day of [*the day appointed for the hearing*] and by so doing you will avoid any further expense, unless I succeed in proving a demand against you exceeding the sum paid into Court by you.

If you have any defence to this summons you must give notice thereof, in writing, stating the grounds, legal and equitable, to me at [*insert an address*] days at least before the said day of [*the day appointed for the hearing*].

You may have subpoenas for the attendance of witnesses by applying to the Chief Clerk of the Court at the Court House at

No. 117.

#### FORM OF NOTICE OF MOTION.

The Insolvency Acts.

In the Court of Insolvency,  
District.

In the Matter of A.B., of an insolvent.

Take notice that it is the intention of C.D., of [*state address fully*] to apply to the Court of Insolvency at on the day of 18 at the hour of for an order as follows [*set out particulars of what desired*] on the grounds following, that is to say [*here set out grounds legal or equitable*].

(Signed) K.Q. in person, or  
Solicitor for the said K.Q.  
[*Address.*]

NOTE.—If you desire to oppose this application you must deliver a notice, in writing, at the address following [*set out address*] on or before

You may pay into Court [*here follow as nearly as may be as in a summons under section 96 of the Principal Act*].

You may have subpoenas for the attendance of witnesses by applying to the Chief Clerk of the Court at the Court House at

No. 118.

#### FORM OF NOTICE OF DEFENCE.

The Insolvency Acts.

In the Court of Insolvency,  
District.

In the Matter of A.B., of an insolvent.

Take notice that I intend to oppose the [*motion or summons as the case may be*] dated the day of 18 [*or such portion as relates to*] on the grounds following [*here state all legal or equitable grounds relied on*].

[*If the case add I have paid £ into Court in full satisfaction, or as the case may be.*]

(Signed) J.G., or  
Attorney for the said J.G.  
[*Address.*]



No. 119.

SUBPENA.

(Title.)

VICTORIA by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to *[the names of three witnesses may be inserted]* greeting :

We command you to attend before the Court of Insolvency at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_ at the hour of \_\_\_\_\_ of the clock in the \_\_\_\_\_ noon of the \_\_\_\_\_ and so from day to day until the above matter is heard to give evidence on behalf of *[insert name]* *[add where production of documents required, and also that you bring with you and produce at the time and place aforesaid, here describe shortly the deeds, papers, letters, &c., you require to be produced].*

Given under the seal of our Court of Insolvency the \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_\_\_  
Chief Clerk.

No. 120.

ORDER TO POSTMASTER-GENERAL TO DELIVER LETTERS UNDER SECTION 104  
OF THE PRINCIPAL ACT.

(Title.)

Whereas upon the application of C.D., the trustee *[or assignee]* of the estate and property of the above-named A.B., it has been proved to my satisfaction that there is reason to believe that the above-named A.B. has been guilty of fraud or concealment of property *[or has absconded]*. I do order that, for the period of three months from the *[here insert date of order or order nisi for sequestration]*, all post letters directed or addressed to the said A.B. be re-directed, re-addressed, sent, or delivered by the Postmaster-General, or officers acting under him, to me at *[fill in address of Judge]*, and that an office copy of this order be forthwith transmitted by the assignee *[or trustee]* to the Postmaster-General or officers acting under him.

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_\_\_  
Judge of the Court of Insolvency  
of the \_\_\_\_\_ District.

No. 121.

ISSUES OF FACT FOR TRIAL BY JURY.

(Title.)

On the application of \_\_\_\_\_ and on hearing \_\_\_\_\_ it is ordered that the following issues of fact be tried before \_\_\_\_\_ and a special jury of \_\_\_\_\_ men *[or and jurors if trial to take place in a County Court]* *[add any other necessary directions]*.

ISSUES.

- 1.
- 2.

Given under the seal of the Court this \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_\_\_  
By the Court, \_\_\_\_\_  
Chief Clerk.

No. 122.

MEMORANDUM BY CHIEF CLERK OF ADVERTISEMENT OR GAZETTING.

(Title.)

Name of Paper.	Date of Issue.	Date of Filing.	Nature of Advertisement, &c.

(Signed) \_\_\_\_\_ A.B., Chief Clerk.

## The Insolvency Acts.

day of

189

**Chief Clerk.**

## 189

**Solicitor for the**

## District.

18 , at

189

**Chief Clerk.**

## No. 125.

**WRIT OF FIERI FACIAS ON AN ORDER FOR PAYMENT BY INSTALMENTS OF DEBT DUE TO THE ESTATE OF INSOLVENT.**

## The Insolvency Acts.

In the Court of Insolvency,  
District.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff greeting :

Whereas by an order of the Court of Insolvency, dated the                      day of 189   , and made in the matter of [*insert the title of the order*], reciting [*as the case may be*], it was ordered that the said C.D. should pay to A.B., the trustee of the estate and effects of the said insolvent, the sum of £                      in manner following, that is to say, by                      instalments of £                      each, the first whereof was to be made on the                      day of                      and it was ordered that in default of payment of any of the said instalments, the whole sum then remaining unpaid should immediately become payable and be paid : And whereas we are given to understand that default was made in payment of one of the said instalments, and thereupon the said sum of £                      which then remained unpaid [*or the sum of £                     , being the portion of the sum so ordered to be paid which then remained unpaid, according to the facts*] immediately became payable, but the same has not been paid : Therefore we command you that of the real and personal estate of the said C.D. you cause to be made the said sum of £                      [*insert here the sum to be levied*], and that of the real and personal estate of the said C.D. in your bailiwick you further cause to be made interest [*proceeding as in the former form*].

## No. 126.

**WRIT OF FIERI FACIAS ON AN ORDER FOR PAYMENT OF DEBT ADMITTED IN COURT TO BE DUE TO THE ESTATE OF AN INSOLVENT.**

## The Insolvency Acts.

In the Court of Insolvency,  
District.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff, greeting :

Whereas by an order of the Court, dated the                      day of                      18                      and made in the matter of [*insert the title of the order*], reciting that C.D. o                      in his examination taken the                      day of                      and signed and subscribed by him, had admitted that he was indebted to the said insolvent in the sum of £                      upon the balance of accounts between the said C.D. and the said insolvent, it was ordered that the said C.D. should pay to A.B., the trustee of the estate and effects of the said insolvent, in full discharge of the sum so admitted the sum of                      forthwith [*make this conformable to the order*] : And whereas we are given to understand that the said sum of £                      [*or that the sum of £                      part of the said sum of £*] is still unpaid : Now we command you that of the goods and chattels of the said C.D. you cause to be made the said sum of £                      [*insert the sum to be levied*], and that of the goods and chattels of the said C.D. you further cause to be made interest upon the said sum of £                      at the rate of £8 per centum per annum for the said date of the said order : And that you have that money and interest before the Court immediately after the execution hereof to be paid to the said A.B., trustee as aforesaid, in pursuance of the said order : And that you do all such things as by the Acts you are authorized and required to do in this behalf, and in what manner you shall have executed this our writ make appear to our said Court immediately after the execution thereof and have there then this writ.

Witness—                      Esquire, one of the Judges of the Court of Insolvency,  
the                      day of                      18                     , at

Given under the seal of the Court this                      day of                      18

Chief Clerk.

## No. 127.

WRIT OF FIERI FACIAS ON AN ORDER FOR PAYMENT BY INSTALMENTS OF DEBTS  
ADMITTED IN COURT TO BE DUE TO THE ESTATE OF AN INSOLVENT.

The Insolvency Acts.

In the Court of Insolvency,  
District.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and  
Ireland Queen, Defender of the Faith, to the sheriff, greeting :

Whereas by an order of the Court dated the                      day of                      18  
made in the matter of [*insert the title of the order*] reciting that C.D. of  
in his examination taken the                      day of                      18                      and signed and  
subscribed by the said C.D. [*or as the case may be*] had admitted that he was in-  
debted to the said insolvent in the sum of £                      upon the balance of accounts  
between the said C.D. and the said insolvent, it was ordered that the said C.D.  
should pay to A.B. the trustee of the estate and effects of the said insolvent in  
full discharge of the said sum of £                      the sum of £                      in manner  
following that is to say by instalments of £                      each the first whereof was  
to be made on the                      day of                      and it was ordered that in default  
of payment of any of the said instalments the whole sum then remaining unpaid  
should immediately become payable and be paid. And whereas we are given to  
understand that default was made in payment of one of the said instalments, and  
thereupon the said sum of £                      which then remained unpaid [*or the sum*  
of £                      being the portion of the sum so ordered to be paid which then  
remained unpaid according to the facts] immediately became payable but the same  
has not been paid. Therefore we command you that of the goods and chattels of  
the said C.D. you cause to be made the said sum of £                      [*insert here the sum*  
*to be levied*], and that of the goods and chattels of the said C.D. you further cause  
to be made interest [*proceeding as in the former form*].

## No. 128.

WRIT OF FIERI FACIAS ON AN ORDER FOR PAYMENT OF DEBTS ADMITTED IN  
COURT TO BE DUE TO THE ESTATE OF AN INSOLVENT AND COSTS ASSESSED BY  
THE COURT.

The Insolvency Acts.

In the Court of Insolvency,  
District.

VICTORIA, by the grace of God [*as in the forms given above reciting the order*  
*including the portion of it relating to costs*].

And whereas, we are given to understand that the sum of £                      and of  
£                      are still unpaid [*make this agree with the facts*], now we command you  
that of the goods and chattels of the said C.D. you cause to be made the said sum  
of £                      and £                      [*proceed as in the above forms with necessary variations*].

## No. 129.

WRIT OF FIERI FACIAS ON AN ORDER FOR PAYMENT OF COSTS TO BE TAXED.  
The Insolvency Acts.

In the Court of Insolvency,  
District.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and  
Ireland Queen, Defender of the Faith, to the Sheriff, greeting :

We command you that of the goods and chattels of C.D. you cause to be made  
the sum of £                      for certain costs which by an Order made by our Court in the  
matter of [*insert the title of the order*] dated the                      day of                      were  
ordered to be paid by the said C.D. to A.B., trustee of the estate and effects of  
[*omit this if not applicable, and alter the form to suit the facts of the*  
*case*] which costs have been since taxed at the sum of £                      as appears by an  
allocatur dated the                      day of                      and that of the goods and chattels  
of the said C.D. You further cause to be made interest at the rate of £6 per cent.  
per annum on the said sum from the said date of the said allocatur. And that

**you** have that money and interest before our Court immediately after the execution hereof to be paid to the said A.B. in pursuance of the said Order. And that **you** do all such things as by the Acts you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ make **appear** to our said Court immediately after the execution thereof.

Witness— Esquire, one of the Judges of the Court of Insolvency,  
the day of 18 at  
Given under the seal of the Court this day of 18  
Chief Clerk.

—  
No. 130.

WRIT OF VEDITIONI EXPONAS.

The Insolvency Acts.

In the Court of Insolvency,  
District.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff, greeting :

Whereas by our writ we lately commanded you that of the goods and chattels of C.D. [*here recite the mandatory part of the fieri facias to the end*] and on the day of 18 you returned to our said Court that by virtue of the said writ to you directed you had taken goods and chattels of the said C.D. to the value of the money and interest aforesaid, which said goods and chattels remained in your hands unsold for want of buyers [*to be varied according to the actual return*]. Therefore we, being desirous that the said A.B. should be satisfied the money and interest aforesaid, command you that you expose to sale and sell or cause to be sold the goods and chattels of the said C.D. by you in form aforesaid taken and every part thereof for the best price that can be gotten for the same, and have the money arising from such sale before our said Court immediately after the execution hereof to be paid to the said A.B., and have there then this writ.

Witness— Esquire, one of the Judges of the Court of Insolvency,  
the day of 18 , at  
Given under the seal of the Court this day of 18  
Chief Clerk.

—  
No. 131.

APPLICATION BY TRUSTEE FOR COMMITTAL OF INSOLVENT OR OTHER PERSON.

(Title).

I, the trustee of the property of the said insolvent [*or as the case may be*] do apply to this Court for an order of committal for contempt of this Court against the said insolvent [*or L.M.*], on the ground set forth in the annexed affidavit.

Dated this day of 189  
G.H., Trustee.

—  
No. 132.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR COMMITTAL OF DEBTOR FOR CONTEMPT UNDER SECTION 128 OF THE PRINCIPAL ACT.

(Title.)

I, G.H., the assignee of the estate of the said debtor [the trustee of the property of the said insolvent] make oath and say :—

1. That the said debtor did attend an examination sitting of the Court held on the day of 18 at and wilfully refused to submit to be examined at such meeting as to his trade, dealings, and estate, the submitting to examination being a duty imposed upon him by the *Insolvency Act 1890*.

[1. That the said [debtor] insolvent did wilfully fail to attend a meeting of his creditors held on the day of 18 at [or to wait on me at my office on the day of 18 ]. The attending such meeting [or waiting on me] being a duty imposed upon him by the *Insolvency Act 1890*.

(Or 1. That the said [debtor] insolvent has wilfully failed to execute [*here describe the deed, &c., that he has failed to execute*] the execution of such deed when required by me being a duty imposed upon him by the 128th section of the said Act.)

2. [That the said [debtor] insolvent was, on the \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_\_\_ duly served with a notice a copy of which is hereunto annexed by leaving the same at his usual place of residence requiring him to attend the said meeting] [or to execute the above-mentioned deed, &c.]

[Or 1. That the said [debtor] insolvent has wilfully failed to perform the duty imposed upon him by the 128th section of the *Insolvency Act 1890* [*here insert any act he has been required to do by any special order of the Court, stating the day on which the order was made*].

2. That the said [debtor] insolvent was duly served with a copy of such order by leaving the same at his usual place of residence on the \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_\_\_ ]

[Or 1. That the said [debtor] insolvent has failed to deliver up possession of [*here state the property he has failed to deliver up*] which property is divisible amongst his creditors under the said Act, and which said property was [or is] in his possession or control, he having been required by me to deliver up the said property by notice, a copy of which is hereunto annexed and which notice was duly served upon him on the \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_\_\_ at \_\_\_\_\_ ]

Sworn at, &c.

G.H.

No. 133.

#### NOTICE OF APPLICATION FOR COMMITTAL UNDER SECTION 128 OF THE PRINCIPAL ACT.

(Title.)

To the said A.B., insolvent.

Take notice that I, the assignee [or trustee] of the property of you, the said insolvent, will on the \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_\_\_ at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, apply to this Court for an order for your committal to prison for contempt of this Court, you having failed to perform the duty imposed on you by the 128th section of the said Act [*here set out the duty he has failed to perform*]. And further take notice that you are required to attend the Court on such day at the hour before stated to show cause why an order for your committal should not be made.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_\_\_

Trustee.

No. 134.

#### ORDER OF COMMITTAL.

(Title.)

Whereas by an order of this Court dated \_\_\_\_\_ it was ordered [*recite order in part of order*]: Now upon application of \_\_\_\_\_ of \_\_\_\_\_ and upon reading [or hearing] [*set out evidence*] and upon hearing \_\_\_\_\_ for the said [applicant] and \_\_\_\_\_ for the said [the person in default] [or if he does not appear so state] this Court doth adjudge and determine that the said \_\_\_\_\_ hath been guilty of a contempt of this Court by his disobedience of the said order, and this Court doth therefore order that the said \_\_\_\_\_ do stand committed to [*here insert prison*] for his said contempt.

Given under the seal of the Court this \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_\_\_

By the Court,  
Chief Clerk.

No. 135.

#### WARRANT OF ATTACHMENT BY TRUSTEE. The Insolvency Acts.

In the Matter of A.B., of \_\_\_\_\_ an insolvent.

Whereas the estate of the above-named A.B. was by order dated the \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_\_\_ placed under sequestration in my hands [*if assignee or*

*trustee named in order or if trustee elected or appointed*, and I was duly confirmed as trustee of such estate by order dated the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_ ] : I hereby authorize you, C.D., of \_\_\_\_\_ as my messenger, to seize and lay an attachment on the insolvent estate, and make an inventory thereof.

Assignee [or trustee] of the estate of the said \_\_\_\_\_

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_

Trustee [or assignee].

No. 136.

# WARRANT AGAINST DEBTOR ABOUT TO QUIT VICTORIA, ETC.

## The Insolvency Acts.

In the Court of Insolvency, \_\_\_\_\_ District.

In the Matter of an insolvency petition against A.B., of \_\_\_\_\_ [or In the matter of A.B., of \_\_\_\_\_ an insolvent].

To \_\_\_\_\_ and to the governor or keeper of the [here insert the prison].

Whereas by evidence taken upon oath it hath been made to appear to the satisfaction of the Court that there is probable reason to suspect and believe that the said A.B. is about to go abroad [or quit his place of residence] with a view of avoiding service of this petition [or of avoiding appearing to this petition, or of avoiding examination in respect of his affairs, or otherwise delaying or embarrassing the proceedings in insolvency].

[Or that there is probable cause to suspect and believe that the said A.B. is about to remove his goods or chattels with a view of preventing or delaying such goods or chattels being taken possession of by the trustee of the property of the insolvent [or that the said A.B. has concealed [or is about to conceal or destroy] his goods or chattels, or some of them, or his books, documents, or writings, or some or one of them, which books, documents, or writings, or some or one of them, may be of use to the creditors in the course of the insolvency of the said A.B.]

[Or whereas by evidence taken upon oath it hath been made to appear to the satisfaction of this Court that the said A.B. has removed certain of his goods and chattels in his possession, above the value of Five pounds, without the leave of the trustee, that is to say (here describe the goods or chattels)].

[Or that the said A.B. did without good cause fail to attend at this Court on the \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_ for the purpose of being examined, according to the requirements of the Insolvency Acts, directing him so to attend].

[Or that the said A.B., upon examination under a summons issued under the *Insolvency Act* 1890 was adjudged guilty of contempt (or prevarication, as the case may be)].

These are therefore to require you the said \_\_\_\_\_ to take the said A.B. and to deliver him to the governor or keeper of the above-named prison, and you the said governor or keeper to receive the said A.B., and him safely to keep in the said prison until such time as this Court may order.

Given under the seal of the Court this \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_

By the Court, \_\_\_\_\_  
Chief Clerk.

No. 137.

## SEARCH WARRANT.

### The Insolvency Acts.

In the Court of Insolvency \_\_\_\_\_ District.

In the Matter of A.B., of \_\_\_\_\_

Whereas by evidence duly taken upon oath it hath been made to appear to the Court that there is reason to suspect and believe that property of the said debtor is concealed in the house [or other place describing it as the case may be] of one X.M., of \_\_\_\_\_ in the county of \_\_\_\_\_ such house [or place] not belonging to the said debtor.

These are therefore to require you to enter in the daytime into the house (or other place, describing it) of the said X.M., situate at \_\_\_\_\_ aforesaid, and there diligently to search for the said property, and if any property of the said debtor shall be there found by you on such search, that you seize the same, to be disposed of and dealt with according to the provisions of the said Acts.

Given under the seal of the Court this \_\_\_\_\_ day of \_\_\_\_\_ 189

To \_\_\_\_\_ By the Court, Chief Clerk.

No. 138.

#### WARRANT OF SEIZURE.

(Title).

Whereas on the \_\_\_\_\_ day of \_\_\_\_\_ 189 an order of sequestration was made against the said debtor:—These are therefore to require you forthwith to enter into and upon the house and houses and other the premises of the said debtor, and also in all other place and places belonging to the said debtor where any of his goods and moneys are, or are reputed to be; and there seize all the ready money, jewels, plate, household stuff, goods, merchandises, books of account, and all other things whatsoever belonging to the said debtor except his tools of trade (if any) and the necessary wearing apparel and bedding of himself, his wife, and children, to a value inclusive of tools, apparel, and bedding not exceeding £20 in the whole as excepted by the *Insolvency Act 1890*. And that which you shall so seize you shall safely detain and keep in your possession until you shall receive other orders in writing for the disposal thereof from the trustee [or assignee]; and in case of resistance, or of not having the key or keys of any door or lock of any premises belonging to the said debtor, where any of his goods are, or are suspected to be, you shall break open or cause the same to be broken open, for the better execution of this warrant.

Given under the seal of the Court this \_\_\_\_\_ day of \_\_\_\_\_ 189

By the Court, Chief Clerk.

To the X.Y. Officer of this Court, and to his assistants.

No. 139.

#### WARRANT OF COMMITTAL FOR CONTEMPT.

The Insolvency Acts.

In the Court of Insolvency,

In the Matter of \_\_\_\_\_ of \_\_\_\_\_

To \_\_\_\_\_ and to \_\_\_\_\_ the governor or keeper of [here insert prison.]

Whereas by an order of this Court, bearing date the \_\_\_\_\_ day of \_\_\_\_\_ it was ordered that the said \_\_\_\_\_ should stand committed for contempt of this Court.

These are therefore to require you, the said \_\_\_\_\_ to take the said and to deliver him to the governor or keeper of the above-named prison, and you the said governor or keeper to receive the said \_\_\_\_\_ and him safely to keep in the said prison and in your custody until such time as this Court shall order. And you the said governor or keeper shall while the said \_\_\_\_\_ is in your custody at all times when the Court shall so direct produce the said \_\_\_\_\_ before the Court.

Given under the seal of the Court this \_\_\_\_\_ day of \_\_\_\_\_ 189

By the Court, Chief Clerk.



## No. 140.

WARRANT TO APPREHEND A PERSON SUMMONED UNDER SECTION 135 OF THE  
PRINCIPAL ACT.

## The Insolvency Acts.

In the Court of Insolvency.  
District.

In the Matter of A.B., of                      an insolvent.

To X.Y.                      and to the governor or keeper of the [*here insert the prison*].

Whereas by summons dated the                      day of                      189   and directed to the said A.B. [*or F.M. of as the case may be*], he was required personally to be and appear on the                      day of                      instant, at                      o'clock in the noon at this Court, to be examined; and which said summons was afterwards, on the                      day of                      189   as hath been proved upon oath, duly served upon the said A.B. [*or F.M.*], and a reasonable sum was tendered him for his expenses; And whereas the said A.B. [*or F.M.*], having no lawful impediment made known to or allowed by this Court, hath not appeared before this Court as by the said summons he was required, but therein has wholly made default: These are therefore to will, require, and authorize you the said X.Y. immediately upon receipt hereof, to take the said A.B. [*or F.M.*] and deliver him to the governor or keeper of the above-named prison, and these are to authorize you the said governor or keeper to receive and safely keep the said A.B. [*or F.M.*] until the day of                      189   at the hour of                      and then and there to have him before this Court in order to his being examined as aforesaid, and for your so doing this shall be your sufficient warrant.

Given under the seal of the Court this                      day of                      189

By the Court,                      Chief Clerk.

## No. 141.

## WARRANT OF COMMITTAL FOR PREVARICATION.

## The Insolvency Acts.

In the Court of Insolvency.  
District.

In the Matter of A.B., of

To                      and to                      keeper of the gaol at

Whereas the said A.B. having been duly summoned to appear and be examined before this Court on the                      day of                      did so appear, and being duly sworn was so examined as aforesaid: And whereas the said                      was during the course of such examination adjudged by the Court guilty of prevarication [*or evasion, as the case may be*]: This is therefore to authorize you, the said                      to apprehend the said A.B., and deliver him to the keeper of the gaol at                      and you the said keeper to receive the said A.B., and him safely keep until the                      day of                      and for so doing this shall be your sufficient warrant.

Given under the seal of the Court this                      day of                      189

By the Court,                      Chief Clerk

## No. 142.

## WARRANT TO HOLD TO BAIL UNDER SECTION 148.

## The Insolvency Acts.

In the Court of Insolvency,  
District.

In the Matter of A.B., of

To \_\_\_\_\_ of \_\_\_\_\_ and to \_\_\_\_\_ the governor or keeper of Her Majesty's gaol at \_\_\_\_\_

Whereas the above-named A.B. has applied to this Court for a certificate of discharge, and such application is now pending and is opposed : And whereas the Court has required the said \_\_\_\_\_ to find bail with two sufficient sureties to attend upon the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ o'clock, the day appointed for giving judgment on the said application, and the said \_\_\_\_\_ has made default in giving such bail ; these are therefore to require you the said \_\_\_\_\_ to take the said \_\_\_\_\_ and deliver him safely to the said \_\_\_\_\_ and these are to require you the said \_\_\_\_\_ to receive and safely keep the said \_\_\_\_\_ until the \_\_\_\_\_ day of \_\_\_\_\_ 189 \_\_\_\_\_ at the hour of \_\_\_\_\_ the day appointed for giving judgment on the said application, and then to have the said \_\_\_\_\_ before this Court at \_\_\_\_\_

Given under the seal of the Court this \_\_\_\_\_ day of \_\_\_\_\_ 189 \_\_\_\_\_

By the Court,  
\_\_\_\_\_  
Chief Clerk.

No. 143.

#### ORDER FOR DISCHARGE FROM CUSTODY ON CONTEMPT.

(Title.)

Upon application made this \_\_\_\_\_ day of \_\_\_\_\_ for A.B., who was committed to prison for contempt by order of this Court dated the \_\_\_\_\_ day of \_\_\_\_\_ 189 \_\_\_\_\_ and upon reading his affidavit showing that he has cleared [or is desirous of clearing] his contempt, and has paid the costs occasioned thereby and upon hearing the trustee [or C.D., of \_\_\_\_\_] it is ordered that the governor or keeper of [here insert name of prison] do discharge the said A.B. out of his custody as to the said contempt.

Given under the seal of the Court this \_\_\_\_\_ day of \_\_\_\_\_ 189 \_\_\_\_\_

By the Court,  
\_\_\_\_\_  
Chief Clerk.

No. 144.

#### ORDER FOR PRODUCTION OF PERSON IN PRISON FOR EXAMINATION BEFORE THE COURT.

(Title.)

Upon application made this \_\_\_\_\_ day of \_\_\_\_\_ by [applicant] for an order for the production of A.B., who was committed to prison for contempt by order of this Court dated this \_\_\_\_\_ day of \_\_\_\_\_ for examination before this Court, it is ordered that the governor or keeper of [insert name of prison] do cause the said A.B. to be brought in custody before the Court at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_ for examination before the Court and afterwards to be taken back to the said prison to be there safely kept pursuant to the said order.

Given under the seal of the Court this \_\_\_\_\_ day of \_\_\_\_\_ 189 \_\_\_\_\_

By the Court,  
\_\_\_\_\_  
Chief Clerk.

No. 145.

#### FORM OF INFORMATION UNDER SECTION 147 OF THE PRINCIPAL ACT.

The Insolvency Acts.

In the Court of Insolvency,  
District.

In the matter of A.B., of                      an insolvent.

I the undersigned C.D., of                      inform the Court that                      of  
    a creditor of the above-named A.B., has obtained a sum of money to  
 wit £500 [or certain goods, chattels, or securities for money, *as the case may be*]  
 from                      as an inducement for forbearing to oppose [or for consenting to]  
 the allowance of a certificate of discharge to the above-named C.D. [or for consent-  
 ing to forbear to appeal against the grant of a certificate of discharge to the above-  
 named A.B.] and the said C.D. has thereby rendered himself liable to forfeit treble  
 and lose the value or amount of the said £500 [or goods, chattels, or security] so  
 obtained.

(Signed)

K.Q.

[*The following notice to be added to office copy for service.*]

Take notice that this information will be heard on the                      day of  
    189                      at                      o'clock at                      when an order may be made  
 against the said                      for payment of the said treble value or amount to the  
 said C.D.

No. 146.

AFFIDAVIT OF INFORMER UNDER SECTION 147 OF THE PRINCIPAL ACT.

The Insolvency Acts.

In the Court of Insolvency,  
    District.

In the Matter of A.B., of                      an insolvent.

I,                      of                      make oath and say—

1. That I believe the statements contained in the information in the above  
 matter by me to this Court, dated the                      day of                      18                      and  
 signed by me, to be true.

Sworn, &c.

No. 147.

PETITION UNDER SECTIONS 153 AND 154.

The Insolvency Acts.

To the Court of Insolvency.  
    District.

The humble petition of A.B., of                      &c., sheweth—

That your petitioner alleges that he is unable to pay his debts, and is desirous  
 of instituting proceedings for liquidation of his affairs by arrangement or composi-  
 tion with his creditors, and hereby submits to the jurisdiction of this Court in the  
 matter of such proceedings, and that your petitioner estimates the amount of the  
 debts owing by him to his creditors at £

Your petitioner therefore prays that such resolution or resolutions as his  
 creditors may lawfully pass in the course of such proceedings, and as may  
 require registration, may be duly registered by the Chief Clerk of the  
 Court.

And your petitioner shall ever pray, &c.

Signed by the petitioner A.B., on the                      day of                      189                      in the presence of  
    Chief Clerk or Solicitor. [Address].

[*If the petition be by partners alter the form accordingly.*]

## No. 148.

## AFFIDAVIT IN SUPPORT OF PETITION UNDER SECTIONS 153 AND 154.

## The Insolvency Acts.

In the Court of Insolvency,

District.

I, A.B., of                      make oath and say, as follows :—

I am the [or one of the] petitioner [or petitioners] named in the petition hereto annexed.

I verily believe that it will be most convenient to the creditors whose debts exceed Twenty-five pounds, that the general meeting should be held at

Sworn at

A.B.

[Where an attorney is employed add the following certificate :—]

I certify my belief that it will be most convenient to the creditors of the petitioner that the general meeting should be held at                      [as above].

C.D., solicitor in the matter of the petition.

## No. 149.

## NOTICE TO CREDITORS OF GENERAL MEETING.

## The Insolvency Acts.

In the Court of Insolvency,

District.

In the Matter of proceedings for liquidation by arrangement or composition with creditors instituted by A.B. of                      [description as in petition].

A general meeting of the creditors of the above-named person [or persons] is hereby summoned to be held at [here insert name of town and street or place] on the                      day of                      instant [or next], at                      o'clock in the noon precisely.

The sections of the *Insolvency Act 1890* under which the proceedings are instituted provide as follows :—[Here extract from clause 153, sub-sections 1 and 5, and the first two paragraphs of section 154].

A form of proof and proxy will be found on the third side of this notice.

Dated the                      day of                      189

(Signed)                      A.B. [debtor], or

C.D. [adding address], solicitor for the said debtor.

[In case of partnership the notice must be signed by one of [the partners in the partnership name, or by all the partners, or by a solicitor or solicitors on their behalf.]

## No. 150.

## AFFIDAVIT TO BE ON THIRD SIDE OF NOTICE SUMMONING FIRST GENERAL MEETING.

In the Court of Insolvency,

District.

In the Matter of proceedings for liquidation by arrangement or composition with creditors instituted by A.B., of                      [description as in notice].

I,                      of                      make oath and say as follows :—

The said A.B. was at the date of the institution of the said proceedings, viz. the                      day of                      189                      and still is, justly and truly indebted to me in the sum of                      for [state consideration], as shown by the account hereto annexed, marked "A," or by the following account, viz., for which said sum, or any part thereof, I say that I have not, nor hath \* any person by † order to my knowledge or belief, for † use had or received any manner of satisfaction or security

\* My said partners, or any of them, or the above-named creditor.

† My, or our, or their, or his.

whatsoever, save and except the following :—[Here set out security, or if bills be held, specify them in the schedule].

Date.	Drawer.	Acceptor.	Amount.	Due Date.

Sworn at

NOTE.—If proof made by an employé of creditor or by agent of company as in form No. 75.

No. 151.

NOTICE FOR "GAZETTE."

The Insolvency Acts.

In the Court of Insolvency,  
District.

In the matter of proceedings for liquidation by arrangement or composition with creditors instituted by A.B., of

Notice is hereby given that a first [or second, as the case may be] general meeting of the creditors of the above-named person or persons has been summoned to be held at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ o'clock in the noon precisely.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 189

A.B. or

C.D. (attorney for the said A.B.).

[The signature to this notice, if not sealed, must be verified by affidavit unless signed by a solicitor of the Supreme Court of the Colony of Victoria.]

No. 152.

NOMINATION OF RECEIVER OR MANAGER BY CREDITORS.

The Insolvency Acts.

In the Court of Insolvency,  
District.

In the matter of proceedings for liquidation by arrangement or composition with creditors instituted by A.B., &c.

We, the undersigned, being a majority in value of the creditors of the said A.B., do hereby nominate and appoint Mr. \_\_\_\_\_ of \_\_\_\_\_ to be receiver [or manager] of the estate and effects [and business] of the said A.B. pending the resolution to be come to by the creditors under the said proceedings.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 189

Creditors' Signatures.	Amount of Debts.	Witnesses' Names and Addresses.

No. 153.

STATEMENT OF AFFAIRS UNDER SECTIONS 153 AND 154 OF THE PRINCIPAL ACT  
(Title.)

Gross Liabilities.			Expected to Rank.			Assets.			Estimated to Produce.		
£	s.	d.	(As stated and estimated by Debtor.)			£	s.	d.	(As stated and estimated by Debtor.)		
			Unsecured creditors, as per list (A) .. .. .						Property, as per list (H), viz:—		
			Creditors fully secured, as per list (B) .. .. .						(a) Cash at bankers .. .. .		
			Estimated value of securities .. .. .						(b) Cash in hand .. .. .		
			Surplus .. .. .						(c) Cash deposited with solicitor for costs of petition .. .. .		
			Less amount thereof carried to sheet (C) .. .. .						(d) Stock in trade (cost £ .. .. .)		
			Balance thereof to Contra .. .. .						(e) Machinery .. .. .		
			Creditors partly secured, as per list (C) .. .. .						(f) Trade fixtures, fittings, utensils, &c. .. .. .		
			Less estimated value of securities .. .. .						(g) Farming stock .. .. .		
			Liabilities on bills discounted other than debtor's own acceptances for values, as per list (D), viz:—						(h) Growing crops .. .. .		
			On accommodation bills as drawer, acceptor, or indorser .. .. . £						(i) Furniture .. .. .		
			On other bills, as drawer or indorser .. .. . £						(j) Life policies .. .. .		
			Of which it is expected will rank against the estate for dividend .. .. .						(k) Other property, viz:—		
			Contingent or other liabilities, as per list (E) .. .. . £						Total as per list (H) .. .. .		
			Of which it is expected will rank against the estate for dividend .. .. .						Book debts as per list (I), viz:—		
			Creditors for rent preferential, as per list (F) .. .. .						Good .. .. .		
			Creditors for rates taxes, wages, &c., payable in full, as per list (G) .. .. .						Doubtful .. .. . £ s. d.		
			Deducted Contra .. .. .						Bad .. .. .		
									£ .. .. .		
									Estimated to produce		
									Bills of exchange or other similar securities on hand, as per list (J) £		
									Estimated to produce		
									Surplus from securities in the hands of creditors fully secured (per contra) .. .. .		
									£ .. .. .		
									Deduct creditors for preferential rent and for preferential rates, taxes, wages, &c. (per contra)		
									£ .. .. .		
									Deficiency explained in statement (K) .. .. .		
									£ .. .. .		

I, of in the city of make oath and say that the above statement and the several lists hereunto annexed marked A, B, C, D, E, F, G, H, I, J, and K are, to the best of my knowledge and belief, a full, true, and complete statement of my affairs on the date of the filing of my petition herein.

Sworn at  
day ofin the colony of  
189 , before me,

this

{ Signature—

A.

UNSECURED CREDITORS.

The names to be arranged in alphabetical order and numbered consecutively, creditors for £25 and upwards being placed first.

No.	Name.	Address and occupation.	Amount of Debt.			Date when Contracted.		Consideration.
						Month.	Year.	

Signature—

Dated

189

NOTES.

1. When there is a contra account against the creditor less than the amount of his claim against the estate, the amount of the creditor's claim and the amount of the contra account should be shown in the third column, and the balance only be inserted under the heading "Amount of Debt," thus:—

			£	s.	d.
Total amount of claim	...	...	:	:	:
Less contra account ...	...	...	:	:	:

No such set-off should be included in sheet "I."

2. The particulars of any bills of exchange and promissory notes held by a creditor should be inserted immediately below the name and address of such creditor.

B.

CREDITORS FULLY SECURED.

No.	Name of Creditor.	Address and Occupation.	Amount of Debt.	Date when Contracted.		Consideration.	Particulars of Security.	Date when given.	Estimated value of Security.	Estimated value from Security.
				Month.	Year.					

Signature—

Dated

189





E.

CONTINGENT OR OTHER LIABILITIES.

Full Particulars of all Liabilities not otherwise Scheduled to be given here.

No.	Name of Creditor or Claimant.	Address and Occupation.	Amount of Liability or Claim.	Date when Liability Incurred.		Nature of Liability.
				Month.	Year.	

Signature— Dated 189

F.

CREDITORS FOR RENT, ETC., PREFERENTIAL.

No.	Name of Creditor.	Address and Occupation.	Nature of Claim.	Period during which Claim accrued due.	Date when due.	Amount of Claim.	Amount Preferential.	Difference ranking for Dividend (to be carried to list A.)

(Signature— Dated 189

G.

PREFERENTIAL CREDITORS FOR RATES, TAXES, AND WAGES.

No.	Name of Creditor.	Address and Occupation.	Nature of Claim.	Period during which Claim accrued due.	Date when due.	Amount of Claim.	Amount payable in Full.	Difference ranking for Dividend (to be carried to list A.)

Signature— Dated 189

H.

PROPERTY.

Full particulars of every description of property in possession and in reversion, as defined by section 4 of the *Insolvency Act* 1890, not included in any other list, are to be set forth in this list.

Full Statement and Nature of Property.				Estimate to Produce.		
				£	s.	d.
(a)	Cash at banker's	...	...			
(b)	Cash in hand	...	...			
(c)	Cash deposited with solicitor for costs of petition	...	...			
(d)	Stock in trade, at (cost £ )	...	...			
(e)	Machinery, at	...	...			
(f)	Trade fixtures, fittings, utensils, &c., at	...	...			
(g)	Farming stock	...	...			
(h)	Growing crops, at	...	...			
(i)	Household furniture and effects, at	...	...			
(j)	Life policies	...	...			
(k)	Other property [ <i>state particulars</i> ], viz. :—					

Signature—

Dated 189

I.

DEBTS DUE TO THE ESTATE.

No.	Name of Debtor.	Residence and Occupation.	Amount of Debt.			Folio of Ledger or other Book where Particulars to be found.	When contracted.		Estimated to Produce	Particulars of any securities held for Debt.
			Good.	Doubtful	Bad.		Month.	Year.		

Signature—

Dated 189

NOTE—If any debtor to the estate is also a creditor, but for a less amount than his indebtedness, the gross amount due to the estate and the amount of the contra account should be shown in the third column, and the balance only be inserted under the heading "Amount of Debt," thus—

	£	s.	d.
Due to estate	...	...	...
Less contra account	...	...	...

No such claim should be included in Sheet "A."





**No. 157.**

**FIRST GENERAL MEETING WHERE LIQUIDATION BY ARRANGEMENT RESOLVED ON.**

## The Insolvency Acts.

**In the Court of Insolvency,  
District.**

**In the Matter of proceedings for liquidation by arrangement or composition with  
creditors instituted by A.B., of \_\_\_\_\_, &c.**

We, the undersigned, being the statutory majority of creditors assembled at the general meeting in the above matter, duly held at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_ 189\_\_\_\_, in accordance with the provisions of the said Acts, do hereby resolve as follows:—

1. That the affairs of the said \_\_\_\_\_ shall be liquidated by arrangement and not in insolvency.
2. That \_\_\_\_\_ be and he is hereby appointed trustee.
3. That \_\_\_\_\_ be and they are hereby appointed a committee of inspection [or in lieu of 2 and 3, the following :—That a subsequent meeting be held at \_\_\_\_\_, on \_\_\_\_\_, at \_\_\_\_\_ o'clock a.m. (or p.m.) precisely, for the appointment of a trustee with or without a committee of inspection].
4. That \_\_\_\_\_ be intrusted with the registration of this resolution.

**Chairman.**

[illegible]

**No. 158.**

**FORM OF AFFIDAVIT TO BE USED UPON REGISTRATION OF AN EXTRAORDINARY  
RESOLUTION.**

## The Insolvency Acts.

**In the Court of Insolvency,  
District.**

**In the Matter of proceedings for liquidation by arrangement or composition  
with creditors instituted by A.B., of , &c.**

I, the above-named A.B. [or C.D., of, &c., as the case may be] make oath and say as follows :—

1. That I verily believe that the resolutions, statement of affairs, proofs, and proxies filed in this matter are the whole of the resolutions, statement, proofs, and proxies come to and produced at the general meeting [or meetings] held in this matter on the                      day of                      , (and the                      day of                      ).
2. That I verily believe [*where a person other than the debtor deposes add, after inquiry made by me, and to the best of my knowledge, information, and belief*] that the amount of the assets [or composition] in this matter does not exceed £                      .

Sworn at, &c.

## No. 159.

## CERTIFICATE OF TRUSTEE'S APPOINTMENT.

The Insolvency Acts.

In the Court of Insolvency,  
District.In the Matter of an extraordinary resolution for liquidation by arrangement  
of the affairs of A.B., of &c.This is to certify that C.D. of, &c., has been appointed, and is hereby declared  
to be trustee under this liquidation by arrangement.Given under my hand and the seal of the Court this            day of            1899  
Chief Clerk.

## No. 160.

## NOTICE TO CREDITORS TO COME IN AND PROVE THEIR DEBTS.

The Insolvency Acts.

In the Court of Insolvency,  
District.

In the Matter of, &amp;c.

The creditors of the above-named A.B. who have not already proved their debts  
are required, on or before the            day of            18            to send their names  
and addresses and the particulars of their debts or claims to me, the undersigned,  
of            , the trustee under the liquidation, or in default  
thereof they will be excluded from the benefit of the dividend proposed to be  
declared.

Dated this            day of            18            Trustee.

## No. 161.

## NOTICE TO CLAIMANT OF TRUSTEE'S REJECTION OF HIS CLAIM.

The Insolvency Acts.

In the Court of Insolvency,  
District.

In the Matter of, &amp;c.

Take notice that I, the undersigned trustee under this liquidation, do hereby  
reject your claim against the estate [or to the extent of £            part of your  
claim]. And further take notice that unless within fourteen days you apply to  
the Court to prove your debt and proceed with such application with due dili-  
gence, you will be excluded from dividend.

Dated this            day of            18            Yours, &amp;c.,            Trustee.

To—            Name—  
Address—

## No. 162.

FORM OF PETITION OF CREDITOR WHO HAS HAD NO NOTICE OF LIQUIDATION OR  
COMPOSITION.

The Insolvency Acts.

In the Court of Insolvency,  
District.

In the Matter of            of

To the Court of Insolvency.

The humble petition of            of            sheweth—

1. That the above-named debtor is justly and truly indebted to your petitioner  
in the sum of £            for [set out debt and cause thereof.]

2. That I had no notice of the meeting held on the \_\_\_\_\_ day of \_\_\_\_\_  
 at which it was agreed that the affairs of the said \_\_\_\_\_ should be liquidated  
 by arrangement [or if a composition the composition of \_\_\_\_\_ be accepted].

Your petitioner therefore prays that this Honorable Court will order that  
 the said liquidation [or composition] be not proceeded in, and that the  
 estate of the said \_\_\_\_\_ may be sequestrated for the benefit of his  
 creditors.

(Signed)

\_\_\_\_\_  
 No. 163.

CERTIFICATE BY CREDITORS OF DEBTOR'S DISCHARGE.

The Insolvency Acts.

In the Court of Insolvency,  
 District.

In the Matter of an extraordinary resolution for liquidation by arrangement of  
 A.B., &c.

We, the undersigned, being being three-fourths in number and value of the  
 creditors of the above-named \_\_\_\_\_ who have proved debts, hereby discharge  
 the said A.B. from all debts provable under the said liquidation.

(Signed)

\_\_\_\_\_  
 No. 164.

REPORT OF TRUSTEE AS TO DEBTOR'S DISCHARGE.

The Insolvency Acts.

In the Court of Insolvency,  
 District.

In the Matter of an extraordinary resolution for liquidation by arrangement of  
 the affairs of A.B. of \_\_\_\_\_ &c.

I, being the trustee [or, We, being the trustees] under the above liquidation, do  
 hereby certify and report that I [or we] have examined the discharge of the said  
 A.B., and find that the same is duly signed by the statutory majority of creditors  
 in number and value

To the Chief Clerk.

(Signed)

K.Z., trustee.

\_\_\_\_\_  
 No. 165.

DEBTOR'S DISCHARGE UNDER SECTION 153.

The Insolvency Acts.

In the Court of Insolvency,  
 District.

In the Matter of an extraordinary resolution for liquidation by arrangement  
 of the affairs of A.B., of \_\_\_\_\_, &c.

Whereas the trustee under the said liquidation has certified and reported to me  
 that [here follow certificate of trustee].

I do, therefore, hereby certify such discharge in pursuance of the Acts in that  
 behalf.

Given under my hand and the seal of the Court this \_\_\_\_\_

day of \_\_\_\_\_ 189

Chief Clerk.

\_\_\_\_\_  
 No. 166.

FIRST GENERAL MEETING WHERE COMPOSITION RESOLVED ON.

The Insolvency Acts.

In the Court of Insolvency,  
 District.

In the Matter of proceedings for or towards the liquidation by arrangement  
 or composition with creditors instituted by A.B. of \_\_\_\_\_ &c.

**Chairman**

We, the undersigned, being the statutory majority of creditors assembled at the second meeting in the above matter, duly held at this day of 189 in accordance with the provisions of the said Acts, do hereby confirm the resolution passed by the statutory majority of the creditors of the said A. B.



~~assembled at the first meeting [or do hereby resolve that the affairs of the said~~  
~~A. B. be liquidated by arrangement and not in insolvency]. [And following on as~~  
~~in the form provided for resolution at the first general meeting, where liquidation by~~  
~~arrangement is resolved on.]~~

		Chairman.
No.	Signatures of Creditors.	Amount of Debt.

**No. 169.**

### APPLICATION TO COURT TO APPOINT DAY FOR APPROVING COMPOSITION.

(Title.)

Whereas at a meeting of creditors of the above-named debtor held at on the day of 189 a resolution to accept a composition in satisfaction of the debts due to the said creditors by the said debtor was duly passed by three-fourths in number and value of the creditors of the said debtor appearing on his statement of affairs assembled or represented at the said meeting, and whereas at a subsequent meeting of creditors of the said debtor held at on the day of 18 the said resolution was confirmed by a majority in number and value of the said creditors assembled or represented at the said meeting. Now the\* applies to the Court to fix a day for the consideration of the above-mentioned composition.

The gross amount of the \_\_\_\_\_ on which the percentage fee will be payable  
is £ \_\_\_\_\_

Dated this                      day of                      189

**Debtor [or Creditor].**

(Order.)

Upon reading the above application and hearing it is ordered that the application for the consideration by the Court of the above-mentioned composition shall be heard at on the day of 189 at o'clock in the noon.

Dated this            day of            189

**By the Court,**

**Chief Clerk.**

- “Debtor” or “creditor.”

† Estimated assets [but not exceeding the gross amount of the unsecured liabilities or composition].

**No. 170.**

**ADVERTISEMENT AND NOTICE TO CREDITORS AND OFFICIAL LIQUIDATOR OF  
APPLICATION TO COURT TO APPROVE COMPOSITION.**

(Title.)

Take notice that application will be made to the above Court sitting at on the day of 189 at o'clock in the noon, to approve the composition which by an extraordinary resolution duly passed and confirmed at meetings of creditors held on the day of 189 and day of 18 respectively, was resolved to be accepted by the creditors in satisfaction of the debts due to them from the above-named A.B.

Dated this            day of            189

**A.B.**

The above-named debtor or C.D. a creditor.

## No. 171.

## AFFIDAVIT OF POSTAGE OF NOTICES.

(Title.)

I, \_\_\_\_\_ of \_\_\_\_\_ make oath and say as follows :—

1. That I did on the \_\_\_\_\_ day of \_\_\_\_\_ 189 \_\_\_\_\_ send to each creditor who has proved in this matter and also to all creditors mentioned in the debtor's statement of affairs, and also to the Official Accountant, a notice of the time and place appointed by the Court to consider the composition resolved on by an extraordinary resolution of the creditors of the said A.B., in the form hereunto annexed marked "A."

2. That such notices were addressed to such of the said creditors who have proved their debts according to the addresses in their respective proofs, and to such as have not proved according to their respective names and addresses appearing in the statement of affairs of the said debtor and to the Official Accountant at \_\_\_\_\_ being his last known address.

3. That I sent the said notices by putting the same into the post office, situate \_\_\_\_\_ before the hour of \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon on the same day.

Sworn at \_\_\_\_\_ in the colony of Victoria this \_\_\_\_\_ day of \_\_\_\_\_ One thousand eight \_\_\_\_\_ hundred and ninety- \_\_\_\_\_ before me—

Signature—

## No. 172.

## NOTICE OF OPPOSITION TO COMPOSITION.

(Title.)

I, \_\_\_\_\_ of \_\_\_\_\_ a creditor of the above-named A.B. intend to oppose the composition resolved on by the creditors of the said

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_

C.D.

To— \_\_\_\_\_

## No. 173.

## ORDER ON APPLICATION TO APPROVE COMPOSITION.

(Title.)

On the application of \_\_\_\_\_ and the Court being satisfied that the creditors in the above matter have duly accepted a composition in the following terms, namely [*here insert terms if short, if not, insert "in the terms contained in the paper writing marked 'A,' annexed hereto"*],\* and being satisfied that the said terms are reasonable and calculated to benefit the general body of creditors, and that the said composition provides for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of an insolvent,† and that the case is not one in which the Court would be required or justified, if the estate of the debtor were sequestrated, to refuse or suspend a certificate or to punish the debtor† [*and as the case may be*].

And being satisfied—

(a) That no facts have been proved which would under the Insolvency Acts require or justify the Court, in the case of insolvency, in refusing or suspending a certificate of discharge or in punishing the debtor ; the said composition is hereby approved.

or after\*

And being satisfied that the said terms are not reasonable or calculated to benefit the general body of creditors.

and

—after†

or

and

—being satisfied—

or

(a) That the case is one in which the Court would be required, if the debtor's estate were sequestrated, to refuse [or suspend] his discharge or to punish him ;

- (b) That facts have been proved which would under the Insolvency Acts require or justify the Court, in the case of insolvency, in refusing or suspending the debtor's certificate of discharge or in punishing the insolvent, the Court doth refuse to approve the said composition.

Given under the seal of the Court this                      day of                      189  
By the Court,  
Chief Clerk.

---

No. 174.

NOTICE TO CREDITOR OF INTENTION TO PAY COMPOSITION.

(Title.)

Notice is hereby given that a composition is intended to be paid in the above matter. Your name is included in the list of creditors in the debtor's statement of affairs, but you have not yet proved your debt.

Dated this                      day of                      189  
Trustee.

---

No. 175.

APPLICATION FOR ENFORCEMENT OF PROVISION IN A COMPOSITION.

(Title.)

In the Matter of a composition made by                      of  
I,                      of                      do apply to this Court for an order for the  
enforcement of the provisions of the said composition against                      on the  
grounds set forth in the annexed affidavit.

Dated this                      day of                      189  
F.M.

---

No. 176.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR ENFORCEMENT OF PROVISIONS OF A COMPOSITION.

(Title.)

In the Matter of a composition made by                      of

I,                      of                      make oath and say :—

1. That I am interested in the said composition, having proved my debt as a creditor of the said A.B. [*or as the case may be*].
2. That [*one of*] the provisions of the said composition is [*or are*] that [*here set it or them out*].
3. That                      has failed to comply with the said provisions [*or as the case may be*].

Sworn at, &c.                      F.M.

---

No. 177.

ORDER FOR ENFORCEMENT OF PROVISIONS IN A COMPOSITION.

(Title.)

In the Matter of a composition made by                      of

Upon the application of F.M., of                      and reading [*here insert evidence*]  
and upon hearing                      the Court being of opinion that the provisions of  
the said composition mentioned in the said affidavit should be enforced, it is  
ordered that [*here insert order*].

Given under the seal of the Court this                      day of                      189  
By the Court,  
Chief Clerk.

To—

Take notice that unless you obey the directions contained in this order you will be deemed to have committed a contempt of Court.

## No. 178.

## ANNUAL RETURN TO BE MADE BY TRUSTEES.

Name of debtor.  
 Residence and description.  
 Date of sequestration or petition for liquidation.  
 Name, address, and description of the Trustee.  
 Names, addresses, and descriptions of the committee of inspection.  
 Amount of assets in the debtor's schedule or statement of affairs.  
 Amount of assets on Trustee's estimate.  
 Amount of liabilities.  
 If estate released from sequestration on acceptance of composition, terms of composition to be shortly stated.  
 Date of the discharge of the debtor.  
 Amount of dividends unclaimed.

Dr.	Cr.
Amount of Receipts.	Amount of allowance paid to insolvent (if any) ... Amount of dividends declared ... Amount of expenses incurred and paid under the following heads:— (a) Trustee's remuneration ... (b) Percentage to Treasury ... (c) Assignee's expenses and remuneration ... (d) Law charges paid as taxed, including all court fees and auctioneer's charges ... (e) Incidental outlay ... (f) Extraordinary outlay incurred in management after sequestration or liquidation, such as— (1) Rents and wages ... (2) Materials required to complete contracts, &c. ...

NOTE.—The amount of the payments when set against the receipts ought to bring out the balance of the trustee's last audited account.

Signature.

## No. 179.

OATH TO BE ADMINISTERED TO OFFICER OF COURT TAKING CHARGE OF JURY.

The Insolvency Acts.

You shall well and truly keep this jury in some private and convenient place. You shall not suffer any person to speak to them, neither shall you speak to them yourself without leave of the Court except to ask them if they are agreed on their verdict.

## FORM No. 180.

The Insolvency Acts.

In the Court of Insolvency.

District.

In the matter of the application of \_\_\_\_\_ under section 17 of the *Insolvency Act 1897* as qualified to be appointed to the office of Trustee under the *Insolvency Acts*.

I \_\_\_\_\_ of \_\_\_\_\_ being an applicant for registration as trustee in insolvency under the provisions of the *Insolvency Act 1897* make oath and say—

1. That all dividends in insolvent estates within the meaning of section 60, sub-section (3), of the said Act in my hands on the 1st day of January 1898, and which had not been claimed by the parties entitled thereto for the space of six months next after the same had been payable, have been paid by me into the Insolvency Unclaimed Dividend Fund.

2. That the money so paid in by me since the 1st day of January, 1898, represented dividends unclaimed in the estates of \_\_\_\_\_ and which dividends were declared payable on the \_\_\_\_\_ day of \_\_\_\_\_ 18, &c.

3. That at the present time no dividends unclaimed for a period of six months after being payable are in my hands or at my disposal in any way.

Sworn, &c.

This affidavit, &c.

## PART 2.

### Scale of Solicitor's Costs.

#### 1. PETITIONING DEBTOR'S SOLICITOR'S BILL OF COSTS.

	£	s.	d.	Compare scale of
Instructions for petition ... ..	0	10	0	costs payable
Search for prior petition under Part IV. of the Principal Act ...	0	6	8	under Bank-
If the solicitor resides at a distance—				ruptcy Act 1883.
Writing agent to search for prior petition ... ..	0	5	0	
Agent's writing result of search ... ..	0	5	0	
Drawing petition ... .. per folio, 1s.				
Engrossing ... .. per folio, 6d.				

#### INSTRUCTIONS FOR SCHEDULE.

##### Where the assets are certified—

As not likely to realize £200 ... ..	2	2	0
As likely to exceed £200 but not to exceed £1,000 ... ..	3	3	0
" £1,000                      " £2,000 ... ..	4	4	0
" £2,000                      " £3,000 ... ..	5	5	0
" £3,000                      " £4,000 ... ..	6	6	0
" £4,000                      " £5,000 ... ..	7	7	0
" £5,000                      " £7,500 ... ..	8	8	0
" £7,500                      " £10,000 ... ..	9	9	0
" £10,000 then the fee shall be increased by one guinea for every additional £2,500 or fraction of £2,500 beyond the first £10,000.			

A certificate of the assignee if no trustee be appointed, and of the trustee when a trustee is appointed, as to the value which the assets are likely to realize shall be produced to the taxing officer, and the allowance for instructions for petition made in accordance therewith.

If the assets realize more than the amount certified by the trustee or assignee, as the case may be, the fees may be calculated accordingly, and the additional percentage shall be recoverable out of any assets available after payment of all costs, charges, and fees if claimed in writing before the assets have been distributed by the trustee, and if the assets realize less than the amount so certified the excess of percentage shall be disallowed, and if paid shall be repaid to the trustee.

Engrossing List A ... ..	per folio, 6d.		
Engrossing List B ... ..	per folio, 6d.		
Engrossing List C ... ..	per folio, 6d.		
Engrossing List D ... ..	per folio, 6d.		
Engrossing List E ... ..	per folio, 6d.		
Engrossing List F ... ..	per folio, 6d.		
Engrossing List G ... ..	per folio, 6d.		
Instructions for affidavit in support of petition ... ..		0	10
Drawing same ... ..	per folio, 1s.		
Engrossing ... ..	per folio, 6d.		
Attending deponent to be sworn ... ..		0	6
Paid oath, &c. ... ..			8

		£	s	d
Drawing affidavit verifying preparation of schedule...	per folio, 1s.			
Engrossing ... ..	per folio, 6d.			
Paid oath ... ..				
Attending presentation of petition ... ..		0	10	0
Paid filing affidavits ... ..				
Paid fee on petition ... ..				
Drawing order of sequestration ... ..	per folio, 1s.			
Engrossing ... ..	per folio, 6d.			
Paid fee thereon ... ..				
Copying order for office copy ... ..	per folio, 6d.			
Attending to get certified ... ..		0	6	8
Paid fee ... ..				
Attending lodging with sheriff ... ..		0	6	8
Attending lodging with Registrar-General ... ..		0	6	8
2. PETITIONING CREDITOR'S SOLICITOR'S BILL OF COSTS.				
Compare scale of costs payable under <i>Bankruptcy Act 1883</i> .	Instructions for petition ... ..	1	0	0
	Examining particulars of petitioning creditor's account ... ..	0	6	8
	Where the act of insolvency arises under sub-sections (1), (2), (3), (5), or (8) of section 37 of the <i>Insolvency Act 1890</i> special attendances (where necessary) to examine witnesses as to the facts they can prove shall be allowed, the charges for which and for summoning witnesses or for affidavits shall be in the discretion of the taxing officer according to the circumstances, and where it is necessary to instruct counsel to support the petition the usual charges for brief and counsel's fee shall be allowed.			
	Search for prior petition under Part III. of the Principal Act ... ..	0	6	8
	If the solicitor resides at a distance—			
	Writing agent to search for prior petition ... ..	0	5	0
	Agent's writing result of search ... ..	0	5	0
	Drawing petition ... ..			
	Engrossing ... ..			
	Attesting signature of each petitioning creditor, except where petitioners are in partnership ... ..	0	10	0
	Where petitioning creditor is a company or corporation with seal ... ..	1	1	0
	Instructions for affidavit verifying petition ... ..	0	10	0
	Drawing same ... ..			
	Engrossing ... ..			
	Marking exhibits to affidavit ... ..			
	Attending deponent to be sworn ... ..	0	6	8
	Paid oath ... ..			
	Copy of petition for service ... ..			
	Drawing order nisi ... ..			
	Engrossing ... ..			
	Attending presentation of petition, and on Judge signing order nisi ... ..	0	10	0
	Copying order nisi for office copy ... ..			
	Attending to get certified ... ..	0	6	8
	Fee thereon ... ..			
	Service on respondent ... ..	0	10	0
	If served at a distance of more than 2 miles from the nearest place of business or office of the solicitor serving the same, for each mile beyond such 2 miles therefrom ... ..	0	1	6
	Where, in consequence of the distance of the party to be served, it is proper to effect such service through an agent (other than the Melbourne agent) for correspondence in addition ... ..	0	7	0
	Correspondent's charges, exclusive of mileage, where the fixed sum for costs does not apply ... ..	1	10	0
	Where more than one attendance is necessary to effect service or to ground an application for substituted service such further allowance may be made as the taxing officer shall think fit.			
	Attending searching for notice of opposition ... ..	0	6	8
	Making copy thereof ... ..			
	Drawing affidavit of service of order nisi ... ..			
	Engrossing ... ..			
	Attending deponent to be sworn ... ..	0	6	8

	£	s.	d.
<b>Paid oath</b> ... ..			
<b>Engrossing brief</b> ... .. per folio, 8d.			
<b>Attending counsel therewith</b> ... ..	0	6	8
<b>Attending Court on hearing of petition</b> ... ..	1	0	0
<b>Drawing order absolute</b> ... .. per folio, 1s.			
<b>Engrossing</b> ... .. per folio, 6d.			
<b>Attendance to get signed</b> ... ..	0	6	8
<b>Letters, messengers, &amp;c. (in discretion of taxing officer)</b>			

WHERE THE ACT OF INSOLVENCY ARISES UNDER SUB-SECTIONS  
(5) OR (8) OF SECTION 37 OF THE "INSOLVENCY ACT 1890."

<b>Instructions for affidavit of sheriff's officer</b> ... ..	0	10	0
<b>Drawing same</b> ... .. per folio, 1s.			
<b>Engrossing</b> ... .. per folio, 6d.			
<b>Copying <i>Fi. Fa.</i></b> ... .. per folio, 6d.			
<b>Attending to get certified</b> ... ..	0	6	8
<b>Paid fee</b> ... ..			
<b>Attending deponent to be sworn</b> ... ..	0	6	8
<b>Paid oath and exhibit</b> ... ..			

WHERE ACT OF INSOLVENCY THE FILING A DECLARATION OF  
INABILITY TO PAY.

<b>Drawing declaration for inability to pay</b> ... .. per folio, 1s.			
<b>Engrossing</b> ... .. per folio, 6d.			
<b>Attending attesting</b> ... ..	0	10	0
<b>Attending filing</b> ... ..	0	6	8

COSTS FOR SUBSTITUTED SERVICE WHERE THE DEBTOR KEEPS  
OUT OF THE WAY TO AVOID SERVICE.

<b>Several attendances to serve, without effect, when it appearing that the debtor was keeping out of the way and could not be personally served. Instructions to apply for substituted service</b> ... ..	0	10	0
<b>Drawing affidavit of facts, showing that due pains had been taken to effect personal service</b> ... .. per folio, 1s.			
<b>Engrossing</b> ... .. per folio, 6d.			
<b>Attending to swear affidavit</b> ... ..	0	6	8
<b>Attending to file affidavit, and to apply for order for substituted service</b> ... ..	0	10	0
<b>Drawing order</b> ... .. per folio, 1s.			
<b>Engrossing</b> ... .. per folio, 6d.			
<b>Attending to get signed</b> ... ..	0	6	8

WHERE THE DEBTOR OPPOSES THE ORDER NISI.

<b>Attending petitioner where the debtor has filed notice of opposition</b> ... ..	0	10	0
Special attendances shall be allowed to examine witnesses as to the facts they can prove, the charges for which shall be in the discretion of the taxing officer according to the circumstances, and the usual charges for brief and counsel's fees shall be allowed.			
<b>Preparing subpoena for witness (<i>duces tecum</i>)</b> ... ..	0	12	0
<b>Copy and service</b> ... ..	0	10	0
<b>If served at a distance of more than 2 miles from the nearest place of business or office of the solicitor serving the same, for each mile beyond such 2 miles therefrom</b> ... ..	0	1	6
<b>Where in consequence of the distance of the party to be served it is proper to effect such service through an agent (other than the Melbourne agent), for correspondence in addition</b> ... ..	0	7	0
<b>Correspondent's charges for service of subpoena <i>duces tecum</i> (exclusive of mileage)</b> ... ..	1	10	0
<b>Preparing subpoena for witness (<i>ad test</i>)</b> ... ..	0	10	0
<b>Copy and service</b> ... ..	0	7	6
Mileage as before.			
<b>Correspondent's charges for service (exclusive of mileage)</b> ... ..	1	10	0
<b>Correspondence as before</b> ... ..	0	7	0
<b>Payment of witnesses. (See scale in Part 3.)</b>			

	£	s.	d.
The petitioning creditor shall not be regarded as a witness. He shall not be paid for loss of time, but shall be allowed his expenses of travelling and subsistence.			
Attending Court on hearing of order nisi ... ..	1	0	0
Or, according to circumstances, not to exceed £3 3s.			
Attending by agent ... ..	2	0	0
Where the solicitor resides at a distance from the Court his travelling expenses may be allowed, provided the total charge does not exceed costs of attendance by agent.			

## COSTS OF DEBTOR'S SUMMONS.

Instructions for affidavit of debt and for debtor's summons ... ..	0	10	0
Drawing affidavit of debt ... .. per folio, 1s.			
Engrossing ... .. per folio, 6d.			
Particulars of demand (three copies) ... .. at per folio, 6d.			
Attending each deponent to be sworn ... ..	0	6	8
Paid oath ... ..	0	1	6
Attending filing... ..	0	6	8
Drawing debtor's summons ... .. per folio, 1s.			
Engrossing ... .. per folio, 6d.			
Attending before Judge, applying for summons, and on his granting it	0	10	0
Attending sealing summons, copies, and particulars ... ..	0	6	8
Paid fee.			
Two fair copies debtor's summons.. ... .. per folio, 6d.			
Service... ..	0	10	0
Or according to distance, &c.			
Attending Court on hearing of summons .. ... ..	1	1	0

## WHERE THE DEBTOR IS REQUIRED BY THE COURT TO ENTER INTO A BOND.

Attending to make inquiries as to sufficiency of sureties ... ..	0	13	4
This charge will be subject to increase according to the distance of the sureties' residence, and, where necessary, agency charges for making such inquiries shall be allowed.			
Drawing exceptions to sureties ... .. per folio, 1s.			
Engrossing ... .. per folio, 6d.			
Service thereof on debtor's solicitor ... ..	0	5	0
Attending Court when sureties allowed or disallowed ... ..	1	0	0
Costs of affidavits in opposition to the allowance of the bond for want of sufficiency of sureties the same as of other special affidavits.			

## COSTS OF DEBTOR'S SUMMONS WHERE THE COURT ALLOWS COSTS TO DEBTOR ON DISMISSAL OF SUMMONS.

The debtor's personal expenses for travelling and loss of time according to the scale allowed to witnesses.

And if attended by a solicitor and his costs allowed (which must be by special order of the Court).

Instructions to attend the Court on the summons ... ..	0	10	0
Drawing affidavit of denial of debt ... .. per folio, 1s.			
Engrossing ... .. per folio, 6d.			
Attending deponent to be sworn ... ..	0	6	8
Paid oath.			
Attending Court on hearing of summons ... ..	1	1	0
Drawing order ... .. per folio, 1s.			
Engrossing ... .. per folio, 6d.			
Attending to get signed ... ..	0	6	8
Copy for service ... .. per folio, 6d.			
Service ... ..	0	5	0
Drawing bill of costs, including copy for taxing officer per folio, 1s. 6d.			
Appointment to tax, and copy for service ... ..	0	11	0
Attending taxing ... .. per hour, 10s.			
Paid taxing fee.			

## 3. SPECIAL COSTS.

Attendance at Meeting of Creditors held under section 53 of the Principal Act.

The petitioning creditor's solicitor may be allowed all proper charges

Compare scale of costs payable under *Bankruptcy Act 1883*.



£ s. d.

at the rate specified in the scale for all work necessarily or usefully done in the interests of the creditors generally for the protection or benefit of the estate between the order *nisi* and the date of the order *absolute*; if the trustee shall certify that the work done was necessary or useful, such certificate may be given by the signature of the trustee to a memorandum containing such certificate at the foot of the bill of costs.

In exceptional cases where the petitioning creditor's solicitor has prior to the presentation of the petition rendered special services in the interests of the creditors generally, and such services shall have assisted to preserve or increase the assets or otherwise been of substantial advantage to the estate, the taxing officer may upon a certificate signed by the trustee to that effect which may be given by a memorandum containing such certificate at the foot of the bill of costs allow all proper charges for such services at the rate specified in the scale.

Where the assignee employs the petitioning creditor's solicitor or the debtor's or other solicitor to take any steps for the protection or benefit of the estate, or in other matters not included in the foregoing scale, the costs of work done under such employment shall, in the absence of any special agreement with the assignee, be subject to taxation with Scale No. 6.

#### 4. TAXATION OF PETITIONER'S COSTS.

##### Drawing Bill of Costs, including Copy for Taxing Officer—

On debtor's petition ... .. per folio, 1s. 6d.  
On creditor's petition ... .. per folio, 1s. 6d.

No charges, except those included under the preceding scales, shall be allowed in the case of a debtor's petition or unopposed creditor's petition unless in the latter case the taxing officer considers that for special reasons additional items may be allowed.

Where the petition is opposed, costs may be allowed in addition for necessary matters not provided for under the preceding scales or under Scale No. 6; such allowances shall be made in conformity with that scale as nearly as may be, or with the scales of costs in the Supreme Court according to the nature of the proceeding.

Compare scale of costs payable under *Bankruptcy Act 1883*.

#### 5. DEBTOR'S SOLICITOR'S COSTS.

Where the Court allows costs to the debtor on discharge of order *nisi*.

Attending debtor served with copy of order *nisi* and taking instructions to oppose ... ..

0 10 0 Compare scale of costs payable under *Bankruptcy Act 1883*.

Perusing and considering same ... ..

0 10 0

Drawing notice of opposition ... .. per folio, 1s.

Engrossing ... .. per folio, 6d.

Attending filing ... ..

0 6 8

Costs of procuring *vivâ voce* evidence, and of other incidental charges properly incurred, including usual charges for brief and fees to counsel shall be allowed in the discretion of the taxing officer.

Attending Court on hearing of order *nisi* ... ..

1 0 0

(Or according to circumstances not to exceed £3 3s.)

Attending by agent ... ..

2 0 0

Where the solicitor resides at a distance from the Court, his travelling expenses may be allowed provided the total charge does not exceed costs of attendance by agent.

Drawing order ... .. per folio, 1s.

Engrossing ... .. per folio, 6d.

Attending to get signed ... ..

0 6 8

Letters, messengers, &c. (in discretion of taxing officer).

The debtor's personal expenses for travelling and loss of time shall be allowed according to the scale of witnesses.

#### 6. MISCELLANEOUS AND GENERAL COSTS.

Costs of the day on adjournment where no fixed amount is named in the Order

Compare scale of costs payable under *Bankruptcy Act 1883*.

Attendance in Court ... ..

1 1 0

	£	s	d
Drawing order ... .. per folio, 1s.			
Engrossing ... .. per folio, 6d.			
Attending to get signed ... ..	0	6	8
Attending counsel ... ..	0	10	0
Notice to witnesses, each ... ..	0	3	6
Payment to witnesses (see scale in Part 3)			
The following fees are to be allowed to counsel's clerks :—			
Upon a fee under 5 guineas ... ..	0	2	6
5 guineas, and under 10 guineas ... ..	0	5	0
10 guineas, and under 20 guineas ... ..	0	10	0
20 guineas, and under 30 guineas ... ..	0	15	0
30 guineas, and under 50 guineas ... ..	1	0	0
50 guineas, and upwards, per cent. ... ..	2	10	0
On consultations, senior's clerk ... ..	0	5	0
On consultations, junior's clerk ... ..	0	2	6
On conferences ... ..	0	5	0
Solicitor's managing clerk's fee where there is a trial ... ..	1	0	0
Term fee ... ..	0	15	0

## WARRANTS AND EXECUTIONS.

Warrant, warrant of seizure—search warrant, writ of <i>fiery facias</i> , writ of <i>venditioni exponas</i> ... ..	0	12	0
If more than four folios, for each folio, beyond four ... .. 1s. per folio			

## SERVICE.

Service of petition, order, notice, or other process, each service ...	0	10	0
If the distance be more than 2 miles 1s. 6d. per mile on such further distance, or a sum in the discretion of the taxing officer according to circumstances.			
Service by post, including postage ... ..	0	5	2
Special service under an order (in discretion of taxing officer). In cases of great distance the service shall be by agent unless otherwise sanctioned.			

## INSTRUCTIONS.

For statement of facts or special case ... ..	0	13	4
For record for trial ... ..	0	13	4
For motion ... ..	0	10	0
For any proceeding or application not otherwise provided for ...	0	10	0
For application for directions ... ..	0	10	0
For application for substituted service ... ..	0	10	0
To appear on hearing of a matter under notice of motion ... ..	0	10	0
For special affidavits ... ..	0	10	0
For case for opinion of counsel ... ..	0	10	0
For brief on hearing or determination of any motion before the Court or a Judge ... ..	1	1	0
For brief on issue of fact (such fee as the taxing officer shall think fit).			
For brief on hearing of any motion or issue of fact where witnesses are to be examined or cross-examined, such fee may be allowed as the taxing officer shall think fit, having regard to all the circumstances of the case and to other allowances (if any) for attendance on witnesses and procuring evidence.			
For brief on hearing of any interlocutory motion (or such further sum as the taxing officer may allow) ... ..	0	10	0
For brief on any other proceeding not otherwise provided for, such fee as the taxing officer may allow.			

## DRAWING DOCUMENTS.

Commission or order for examination of witnesses abroad ... .. per folio, 1s.			
Other orders where necessary ... .. per folio, 1s.			
Application for an appointment before the Court, or Judge, or Chief Clerk, and copy ... ..	0	5	0
Briefs and cases for opinion of counsel ... .. per folio, 1s.			

## PERUSALS.

Of notice of motion by the solicitor of the party on whom the same is served ... ..	0	10	0
Or if exceeding 30 folios ... .. per folio, 4d.			

	£	s.	d.
Of documents by Melbourne agent on an appeal ... ..	1	1	0
	to	2	0
Of affidavits, depositions, and exhibits by the solicitor of the party against whom the same can be read			per folio, 4d.
Of other documents, where necessary ... ..			per folio, 4d.

## ATTENDANCES.

At Court on application to transfer proceedings or part of the proceedings from one district to another ... ..	0	10	0
An application for directions ... ..	1	1	0
At Court on application for warrant, warrant of seizure, or search warrant ... ..	1	1	0
Instructing officer as to execution of warrant, warrant of seizure or search warrant ... ..	0	10	0
To file affidavits ... ..	0	6	8
General attendances, each ... ..	0	6	8
Long and special attendances ... ..	0	13	4
(or more in the discretion of the taxing officer).			
At meetings of creditors (other than the meetings under section 53 of the Principal Act) or of committee of inspection, when duly authorized and necessary, per hour ... ..	0	10	0
To insert advertisement ... ..	0	5	0
On taxation of costs, per hour ... ..	0	10	0
On counsel, with brief or other papers—			
If counsel's fee one guinea ... ..	0	5	0
If more and under five guineas ... ..	0	6	8
If five guineas and under twenty guineas ... ..	0	10	0
If twenty guineas ... ..	0	13	4
If 40 guineas or more ... ..	1	10	0
Where conference or consultation with counsel is necessary—			
Attending to appoint same with each counsel (according to amount of fee).			
Attending consultation or conference with counsel ... ..	0	13	4
Attending client, reading over opinion, and conferring with him thereon	0	10	0

## LETTERS, TELEGRAMS, ETC.

Writing letters, each, special ... ..	0	10	0
"    "    common ... ..	0	5	0
Circular letters, original letter, if special ... ..	0	5	0
"    "    if common ... ..	0	3	4
For each copy thereof, including addressing and despatching, not exceeding twenty ... ..	0	1	0
If above twenty in number letters shall be printed, and there shall be allowed for each copy addressed and despatched in addition to printer's charges ... ..	—		
Preparing and attending to despatch necessary telegrams ... ..	0	5	0

## 7. GENERAL REGULATIONS.

1. All costs save as in this scale provided which shall be properly incurred under the provisions of the Acts or Rules shall be allowed on the lower scale in Appendix N to the Rules of the Supreme Court. Compare General Regulations as to costs under Bankruptcy Act 1883.
2. All Court fees and other proper disbursements shall be allowed in addition to the remuneration in this scale provided.
3. Extra allowance for length of sittings or other increased allowances not inconsistent with this scale may be allowed; provided that any such allowance shall have been ordered and certified by the Court at the time, or all such charges will be disallowed.
4. Vouchers shall be produced on taxation for all payments or such payments shall be disallowed. No fee to counsel shall be allowed on taxation unless vouched by his signature.
5. Bills of costs shall be written lengthwise, distinguishing by insertion in separate columns costs out of pocket from charges for work done and time expended. Dates shall be furnished to each item, but they must not be written in the margin, which shall be left clear for taxation.
6. The fees allowed for drawing any affidavit or other document shall include any copy made for the use of the solicitor, agent, or for counsel to settle.

7. No instructions for an affidavit shall be allowed when the solicitor or his clerk makes the affidavit.

8. The allowances for instructions and drawing an affidavit in answer to interrogatories and other special affidavits, and attending the deponent to be sworn shall include all attendances on the deponent to settle and read over.

9. The fees allowed for delivery of documents, services, and notices shall not be allowed when the same solicitor is for both parties unless it be necessary for the purpose of making an affidavit of service.

10. The fees allowed for perusals shall not apply where the same solicitor is for both parties.

11. Where the same solicitor is employed for two or more persons having the same interest, and separate papers are delivered or other proceedings had by or for two or more such persons separately, the taxing officer shall consider, on the taxation of such solicitor's bill of costs either between party and party or between solicitor and client, whether such separate papers or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred the same shall be disallowed.

12. A folio is to comprise 72 words, every figure comprised in a column or authorised to be used being counted as one word.

13. In special cases where the same person acts both as counsel and attorney and there is no brief a charge by the solicitor for the preparation of minutes of fact or evidence for his own use may be allowed, and in addition such special fee as the taxing officer may think fit, having regard to the nature and importance of the case and the questions involved.

14. As to all fees or allowances which are discretionary the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who, in the exercise of such discretion, is to take into consideration other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the matter, the amount involved, the interest of the parties, the estate or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances.

15. Any person who may be dissatisfied with the allowance or disallowance by the taxing officer in any bill of costs taxed by him of the whole or any part of any items may at any time before the certificate or allocatur is signed carry in before the taxing officer an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the items or parts thereof objected to and the grounds and reasons for such objection, and may thereupon apply to the taxing officer to review the taxation in respect of the same.

16. Upon such application the taxing officer shall reconsider and review his taxation upon such objection, and he may, if he shall think fit, receive further evidence in respect thereof, and, if so required by the solicitor or any person interested, he shall state either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision therein, and any special facts or circumstances relating thereto.

17. Any person who may be dissatisfied by the certificate or allocatur of the taxing officer as to any item or part of an item which may have been objected to as aforesaid may within fourteen days from the date of the certificate or allocatur, or such other time as the Court or Judge or taxing officer at the time he signs his certificate or allocatur may allow, apply to the Judge for an order to review the taxation as to the same item or part of an item, and the Judge may thereupon make such order as the Judge may think just, but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid.

18. Such application shall be heard and determined by the Judge upon the evidence which shall have been brought in before the taxing officer, and no further evidence shall be received upon the hearing thereof unless the Judge shall otherwise direct.

19. The fees payable on taxation of costs, except where otherwise provided, shall be taken on signing the certificate or on the allowance of the bill of costs as taxed; but the fees shall be due and payable, if no certificate or allocatur is required, on the amount of the bill as taxed or on the amount of such part thereof as may be taxed, and the solicitor, or party acting in person, shall in such case

cause the proper stamps (the amount thereof to be fixed by the officer) to be impressed on or affixed to the bill of costs.

20. The taxing officer may require a deposit of stamps on account of fees before taxation not exceeding the fees on the full amount of the costs as submitted for taxation, and the officer or his clerk taking such deposit shall make a memorandum thereof on the bill of costs.

## PART 3.

## SCALE OF ALLOWANCES TO WITNESSES.

	If resident at place of hearing of trial or in the neighbourhood.		If resident at any other place beyond five miles.		<i>Vide scale under Insolvency Rules 1890.</i>
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	
Labourers and other common witnesses ..	0 5 0	..	0 5 0	to 0 7 6	
Master tradesmen, yeomen, and farmers, per diem ..	0 7 6	to 0 10 0	0 10 0	to 0 15 0	
Auctioneers and accountants ..	0 10 6	to 1 1 0	0 10 6	to 1 1 0	
Professional men, per diem ..	1 1 0	..	..	..	
Ditto inclusive of all except travelling expenses, per diem ..	..	..	2 2 0	to 3 3 0	
Mechanics and clerks, per diem ..	0 7 6	to 0 10 0	0 15 0	to 1 10 0	
Engineers and surveyors, per diem ..	1 1 0	..	1 1 0	to 3 3 0	
Notaries, per diem ..	1 1 0	..	1 1 0	to 1 10 0	
Gentleman ..	(with subpoena but no daily allowance except after the first day and then a reasonable sum for refreshment and conveyance say 5s.)		1 1 0 per diem.		
Esquires ..					
Bankers ..					
Merchants ..					
Females (according to station in life), per diem ..					
Police Inspector, per diem } A sum equal to	0 5 0	to 0 10 0	0 5 0	to 1 0 0	
Police Constable, per diem } their pay.					
Travelling expenses according to the sums reasonably and actually paid.					
Witness attending in more than one cause or matter will be entitled to a proportionate part only in each cause.					

## PART 4.

## AUCTIONEER'S CHARGES.

Compare scale of costs payable under *Bankruptcy Act 1898*.

For sales in addition to such out of pocket expenses as may be authorized at the time by the trustee or assignee—

Of chattel property not exceeding:—

On the first £500 ... £5 0 0 per cent.

Above, up to £1,000 ... 4 0 0 „

Above £1,000 ... 2 10 0 „

Of estates freehold, leasehold, &c., including prior valuations for determining amount of reserve bids:—

On the first £300 ... £5 0 0 per cent.

On the next £1,600 ... 2 10 0 „

Above, up to £5,000 ... 1 5 0 „

Above £5,000 ... 1 0 0 „

No higher allowance to be sanctioned without the leave of the Court.

Cost of surveys, dilapidations, and

specifications, in discretion of

taxing officer ... £2 0 0 to £5 0 0

## ACCOUNTANT'S CHARGES.

Where the employment of an accountant has been duly sanctioned, and in the absence of any special arrangement with the assignee or the trustee for a smaller amount, the following charges may be allowed:—

For preparing balance sheet, investigating accounts, &c., principal's

time exclusively so employed per

day of 7 hours, including necessary

affidavit ... £1 1 0 to £5 5 0

Chief Clerk's time ... 0 10 6 to 1 11 6

Other clerks' time per day of 7 hours 0 7 6 to 0 16 0

These charges shall include stationery except the forms used.

## PART 5.

*Schedule of Fees and Costs.*

I.—FEES TO BE PAID IN THE OFFICE OF THE COURT.		£	s.	d.
<i>Vide scale under Insolvency Rules 1898.</i>	For setting down any motion or summons under section 96 of the Act or petition or application to the court, to be paid by the party obtaining the appointment	0	10	0
	For office copies, if made in the office, 2s. 6d. for the first folio of ninety words, and 4d. for every succeeding folio of ninety words.			
	For office copies not written in the office, for examining and certifying, 1s. for the first folio of ninety words, and 1s. additional for each succeeding ten folios or parts of folios.			
	For signing and sealing, or signing, or sealing any document not mentioned in section 32 of the Act	0	1	0
	For signing and sealing orders of the Court	0	2	6
	For every summons, subpoena, or warrant	0	1	0
	Upon presenting any petition for sequestration under Part III. of the Act, if the assets on the schedule are under £100	3	0	0
	Ditto, ditto, if the assets on the schedule equal or exceed £100	5	0	0
	For filing any affidavit or document not being a proof of debt	0	1	0
	For every debtor's summons	0	5	0
	Taxing costs, 3d. in the £1 upon the amount allowed by the allocatur.			
	For every certificate of proxy	0	1	0
	For every special meeting called at the request of creditors, to be paid by the trustee	1	0	0
	For every search	0	1	0
	For every order releasing an estate from sequestration	1	0	0
	For every certificate of discharge of an insolvent or debtor under liquidation	1	0	0
	For registration of every extraordinary resolution, not being additional or variation of original resolution, under Parts IX. or X. of the Act, if the assets on debtor's statement are under £100	3	0	0
	Ditto, ditto, if the assets on debtor's statement equal or exceed £100	5	0	0
	For inspecting any resolution or statement under sections 153 or 154 of the Act	0	2	6
	For every certificate of the appointment of a trustee	0	2	6
	For every certificate of the discharge of a trustee	1	0	0
	For setting down any petition for sequestration under Part IX. of the Act	2	0	0
	Setting down motion to sequester under Part X. of the Act	2	0	0
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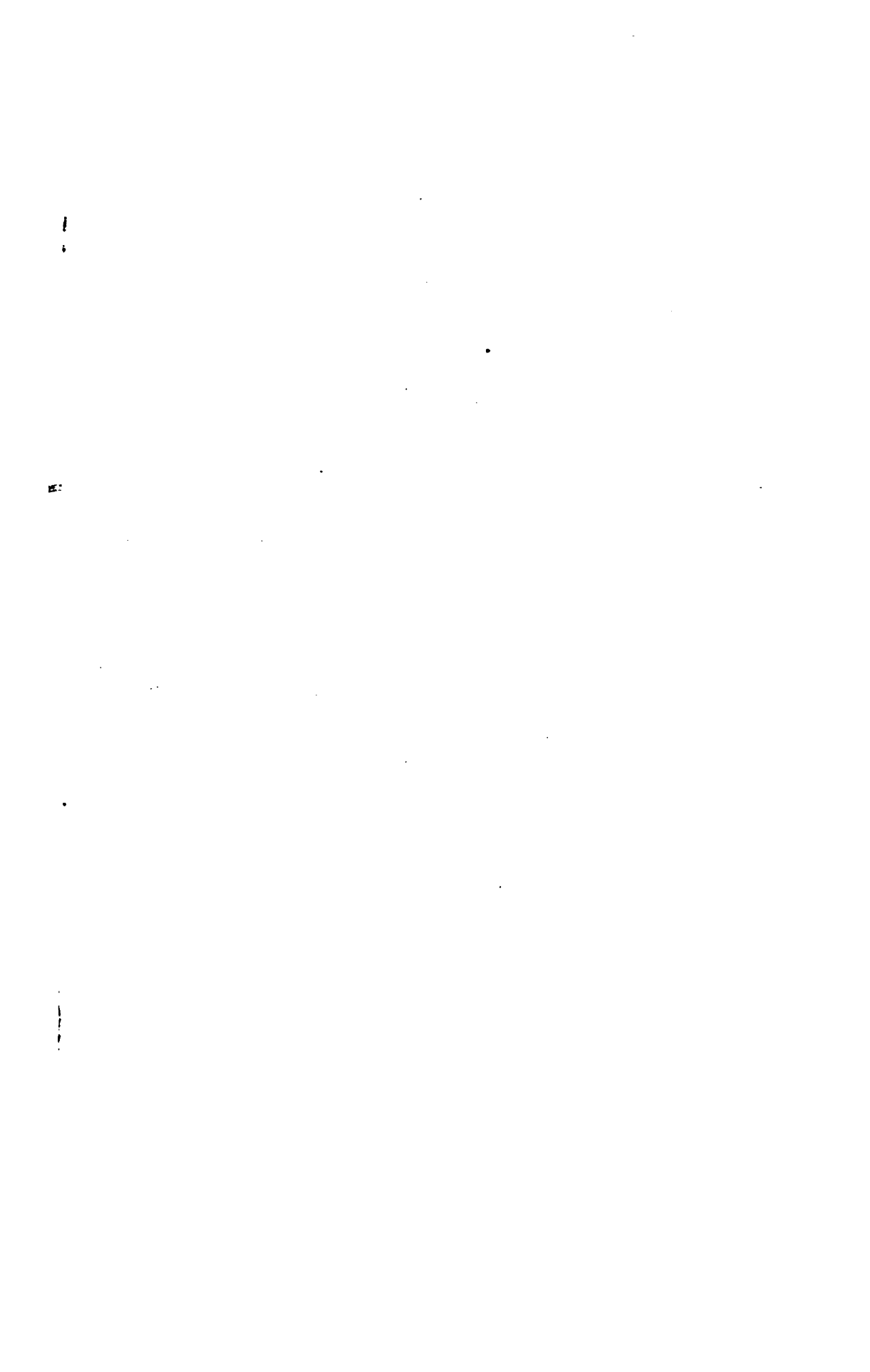
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